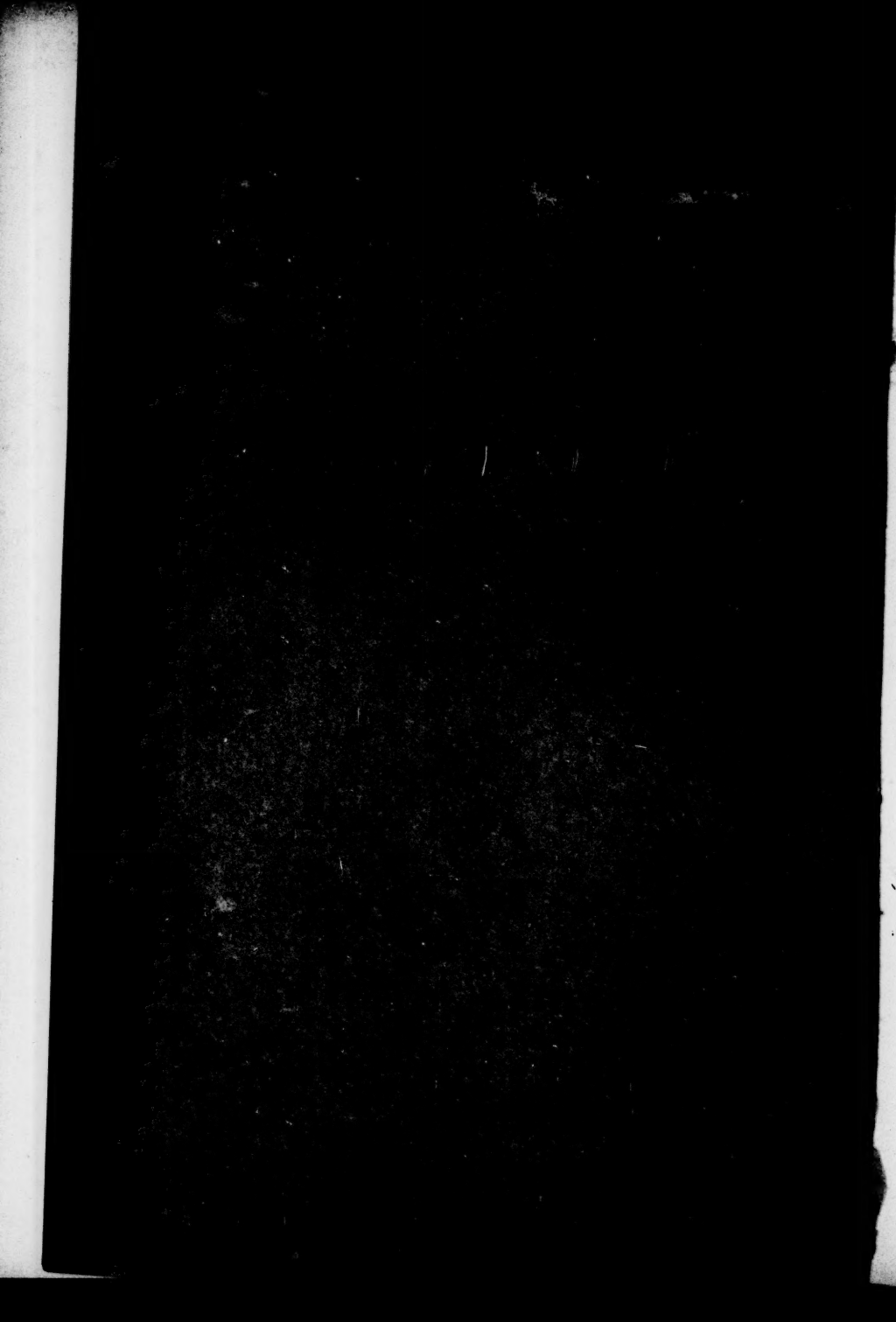

(15,476.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 619.

THE UNITED STATES AND THE CHEROKEE NATION, APPELLANTS,

vs.

CHARLES JOURNEYCAKE, PRINCIPAL CHIEF OF THE DELAWARE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1894.

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1 In the Court of Claims, Term 1889–1890.

CHARLES JOURNEYCAKE, Principal Chief of the Delaware Indians,
vs.
THE CHEROKEE NATION AND THE UNITED STATES.
} No. 16837. In Equity.

I.—*Petition. Filed October* 29, 1890.

The plaintiff, Charles Journeycake, principal chief of the Delaware Indians, suing as such principal chief in behalf of said Delaware Indians, by and under authority of an act of Congress entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee nation and for other purposes," approved October 1, 1890, complains of the said Cherokee nation and for cause of action states, that by a treaty made and entered into by and between the United States and the Cherokee nation on the 19th day of July, 1866, ratified and confirmed on the 11th day of August, 1866, it was provided in the fifteenth article of said treaty, that "the United States may settle any civilized Indians friendly with the Cherokees and adjacent
2 tribes within the Cherokee country on unoccupied lands east of the 96°, on such terms as may be agreed upon by any such tribe and the Cherokees subject to the approval of the President of the United States, which shall be consistent with" certain provisions specifically set forth in said article of said treaty, and on compliance with said provisions by any tribe so settled in said Cherokee nation, it was further provided by said article of said treaty that "thence afterwards they shall enjoy all the rights of native Cherokees."

The plaintiff further states that in pursuance of said treaty, the Delaware Indians were settled upon unoccupied lands in the Cherokee country, east of 96° of west longitude by articles of agreement made on the 8th day of April, 1867, between the Cherokee nation, by its proper and legal representatives, and the Delaware Indians by their legal representatives, after a full and free conference had between the representatives of the Cherokees and Delawares in view of the treaty herein recited, and a treaty between the United States and the Delaware tribe of Indians ratified August 10, 1866, providing for the removal of said Delawares to the Indian country south of Kansas, with the object and purpose of locating said Delawares upon the Cherokee lands, and their consolidation with said Cherokee nation; that by said agreement it was stipulated that the Delawares on their part were to perform certain things and make certain payments to the said Cherokee nation, as in said agreement specifically provided, and on the fulfilment by the Delawares of the stipulations on their part all the members of the Delaware tribe, who had been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs,

being the list of Delawares who elect to remove to the In-
3 dian country, to which list there was to be added by consent of the Delaware council the names of such other Delawares as might within one month after the signing of said agreement be added thereto, should become members of the Cherokee nation, with the same rights and immunities and the same participation in the national funds as native Cherokees, which agreement was, on the 11th day of April, 1867, approved by the President of the United States. A copy of which is herewith filed.

Plaintiff avers that the said Delawares faithfully and fully complied with all the conditions and requirements of the said treaty, and performed, all and singular, the conditions, stipulations, and requirements on their part obligatory on them under said treaty and agreement, and, so the plaintiff avers, that the said Delawares became, and were, and are incorporated into, and members of, the Cherokee nation with the same rights and the same participation in the national property and funds of the Cherokee nation as native Cherokees; that the number of Delawares so entitled is one thousand persons, and they have ever since been subject to, and have obeyed, the constitution and laws of the Cherokee nation as citizens of said nation, having abandoned their separate tribal organization.

1st. For first cause of action the plaintiff states that, being so incorporated into the Cherokee nation and subject to its laws, and entitled to the same rights and immunities, and the same participation in the national funds of the Cherokee nation as native Cherokees, the said Cherokee nation did receive the sum of three hundred thousand dollars into its national treasury, by an appropriation by the act of Congress of March 3, 1883, for lands west of the Arkansas river, and west of 96°, to which sum the said Dela-
wares were entitled under said treaty and agreement to an
4 equal *per capita* share with Cherokees by blood, of twenty dollars each, making the sum of twenty thousand dollars; that the Cherokee legislature, disregarding its treaty obligations and its agreement with the said Delawares, refused to pay to said Delawares their *per capita* share of said fund or any part thereof, but passed an act, May 19, 1883, distributing said fund to the citizens of the Cherokee nation by blood, and did so distribute said fund in disregard of the rights of the said Delawares, wherefore the complainant asks judgment against said Cherokee nation for the sum of twenty thousand dollars, with interest thereon at six per cent. per annum from May, 19, 1883.

2d. Further complaining, the plaintiff states that the said Cherokee nation did receive into its national treasury on or about the 28th day of April, 1886, the further sum of five hundred thousand dollars, being rent or royalty paid for grazing cattle on the land, the common property of said nation, west of 96° west longitude, to which sum the said Delawares were so entitled to participation in distribution of a *per capita* share and interest, equal with the Cherokees by blood; but disregarding the rights of said Delawares, the said Cherokee nation withheld from them their legal share and

proportion of said fund, and still withholds the same and has distributed the same in whole or in part to Cherokees by blood only; that the share and interest of the said Delawares in said fund is the sum of thirty-three thousand three hundred and thirty-two dollars; for which sum they also ask judgment.

3d. Plaintiff further complains of said defendant, The Cherokee Nation, and for another and further cause of action alleges that the said Cherokee nation, by its council and principal chief, about October, 1888, leased the land of said nation, its common property west of 96°, to a certain cattle association for a term of five years
5 for grazing purposes at an annual rental of two hundred thousand dollars per annum, and received into its national treasury on account of said rent the sum of three hundred thousand dollars, of which sum the Delawares are entitled by the treaty and agreement aforesaid to share equally with native Cherokees, but the said Cherokee nation refuses and neglects to pay to the said Delawares any portion of said fund. Complainant avers that the share and interest of the Delawares in said fund in gross is the sum of twenty thousand dollars; for which sum plaintiff also asks judgment.

4th. For another and further cause of action the plaintiff avers that the said Cherokee nation has received into its national treasury for lands assigned to the Ponca Indians west of 96° out of an appropriation made by an item contained in the act of Congress approved March 3, 1881, the sum of forty-eight thousand three hundred and eighty-nine dollars and forty-six cents; that the said plaintiff, The Delaware Indians, so incorporated into the Cherokee nation as aforesaid, are entitled to a share and interest in said sum, under the aforesaid articles of the treaty and articles of agreement, amounting to three thousand two hundred and twenty-five dollars, but the said Cherokee nation neglect and refuse to pay the same or any part thereof; wherefore plaintiff asks judgment for the same, with interest at five per cent. per annum from March 3, 1881.

5th. The plaintiff, for another and further cause of action, alleges that the said Cherokee nation has received into its national treasury the further sum of three hundred thousand dollars, being an amount appropriated by item contained in the act of Congress approved June 16, 1880, to be paid into the treasury of the Cherokee nation out of the funds due said nation for its lands in the Indian
6 Territory west of the Arkansas river and west of 96°; that of said sum the Delaware Indians are entitled to have and receive the sum of twenty thousand dollars, being the share and interest in gross of said Delawares, but the said Cherokee nation disregarding its obligation under the said treaty and article of agreement, unlawfully and wrongfully withholds the same, and has refused and neglected to pay the same or any part thereof; wherefore plaintiff also asks judgment for said amount of twenty thousand dollars, with interest thereon at five per cent. per annum from June 16, 1880.

6th. The plaintiff further complains of the said Cherokee nation, and for another cause of action alleges that pursuant to the 16th

article of the said treaty between the United States and the Cherokee nation, made in 1866, and the provisions of an act of Congress approved June 5, 1872, the said Cherokee nation sold to the Osage Indians a tract of land of 1,570,196 acres, the common property of the Cherokee nation, lying west of the line of ninety-six degrees west longitude, for the aggregate sum of one million and ninety-nine thousand one hundred and thirty-seven dollars and forty-one cents, which land was conveyed by the said Cherokee nation to the United States in trust for the benefit of the Osage and Kansas Indians by deed dated June 14, 1883; that said sum of one million and ninety-nine thousand one hundred and thirty-seven dollars and forty-one cents the United States holds as trustee for said Cherokee nation; that the plaintiff, The Delaware Indians, so incorporated into the Cherokee nation as aforesaid as a part of the Cherokee nation, under and by virtue of the treaty and agreement hereinbefore set forth, on equal terms in every respect with native Cherokees with respect to all moneys, lands, and rights of said nation, became and were entitled to an equal share and proportion of the said trust fund with native Cherokees; that the share and interest of
7 the said Delawares, in gross, in and to said trust fund, is the sum of seventy-three thousand two hundred and seventy-five dollars and eighty-two cents, which sum, or any part thereof, the said Cherokee nation refuses and neglects to pay to the said Delaware Indians, and which remains due and owing to them, and for which plaintiff also asks judgment.

7th. The plaintiff states that the United States is trustee for the said Cherokee nation, and as such trustee holds in its possession a large amount of money and securities, the amount of which plaintiff is unable to state. Plaintiff asks that said trust fund be subjected by order of this court to the payment of the judgment herein.

8th. The plaintiff asks judgment upon the causes of action aforesaid, in the aggregate, for the sum of one hundred and sixty-nine thousand eight hundred and thirty-two dollars and eighty-two cents, with interest on the several amounts from the date they were severally due and owing. That plaintiff and said Delawares, whom he represents, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government of the United States, and he believes the facts stated in the foregoing petition to be true.

CHARLES JOURNEYCAKE,
Principal Chief of the Delaware Indians;
By THO. C. FLETCHER,
His Attorney.

UNITED STATES OF AMERICA, *ss:*

Thomas C. Fletcher, attorney for Charles Journeycake, principal chief of the Delaware Indians, being duly sworn, upon his oath states that the foregoing petition and the matters therein as stated, are true to the best knowledge, information, and belief of affiant.

THO. C. FLETCHER.

8 Subscribed and sworn to before me this 29th day of October, 1890.

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Articles of agreement made this 8th day of April, A. D. 1867, between the Cherokee nation, represented by William P. Ross, principal chief, Riley Keyes and Jesse Bushyhead, delegates duly authorized, parties of the first part, and the Delaware tribe of Indians, represented by John Connor, principal chief; Charles Journeycake, assistant chief; Isaac Journeycake and John Sarcoxie, delegates for and on behalf of said Delaware tribe, duly authorized, witnesseth:

Whereas, by the fifteenth article of a certain treaty between the United States and the Cherokee nation, ratified August 11, 1866, certain terms were provided, under which friendly Indians might be settled upon unoccupied lands in the Cherokee country east of the line of the 96° of west longitude, the price to be paid for such lands to be agreed on by the Indians to be thus located and the Cherokee Nation, subject to the approval of the President of the United States; and whereas, by a treaty between the United States and the Delaware tribe of Indians, ratified August 10, 1866, the removal of the said Delawares to the Indian country south of Kansas was provided for; and, in the fourth article whereof, an agreement was made by the United States to sell to the Delawares a tract of land, being part of a tract the cession of which by the Cherokees to the United States was then contemplated: and whereas no such cession of land was made by the Cherokees to the United States, but in lieu thereof terms were provided, as hereinbefore mentioned, under which friendly Indians might be settled upon their lands; and whereas a full and free conference has been had between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee nation;

9 Now, therefore, it is agreed between the parties hereto subject to the approval of the President of the United States, as follows:

The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfilment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to one hundred and sixty acres for each individual of the Delaware tribe, who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elect to move to the "Indian country," to which list may be added, only with the consent of the Delaware council, the names of such other Delawares as may, within one month after the signing of this agreement, desire to be added thereto, and the selections of the lands to be purchased by the Delawares may be made by said Delawares in

any part of the Cherokee reservation east of said line of 96°, not already selected and in possession of other parties, and in case the Cherokee lands shall hereafter be allotted among the members of said nation, it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivisions when surveys are made—that is to say, one hundred and sixty acres for each individual—shall be guaranteed to each Delaware incorporated by these articles into the Cherokee nation, nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with, in any manner whatever, without his consent, but shall be subject to the same conditions and restrictions as are, by the laws of the Cherokee nation, imposed upon native citizens thereof.

Provided that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee nation.

And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees, from the Delaware funds now held or hereafter received by the United States, a sum of money equal to one dollar per acre for the whole amount of one hundred and sixty acres of land for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto heretofore provided for.

And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares to procure funds necessary to pay for said lands; but in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee nation at their market value, at the date of such transfer.

And the said Delawares further agree that there shall be paid from their funds now or hereafter to come into possession of the United States, a sum of money which shall sustain the same proportion to the existing Cherokee national fund that the number of Delawares registered as above mentioned and removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee nation. And for the purpose of ascertaining such relative numbers, the registers of the Delawares herein referred to, with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares, and an accurate census of the Cherokees residing in the Cherokee nation shall be taken under the laws of that nation within four months, and properly certified copies thereof filed in the Office of Indian Affairs, which shall be the basis of the calculation as to the Cherokees.

And that there may be no doubt hereafter as to the amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000.

And the Delawares further agree, that in calculating the total amount of said national fund there shall be added to the said sum of $678,000 the sum of $1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee national fund $1,678,000; and this last-mentioned sum shall
11 be taken as the basis for calculating the amount which the Delawares are to pay into the common fund.

Provided, that as the $678,000 of funds now on hand belonging to the Cherokees is chiefly composed of stocks of different values, the Secretary of the Interior may transfer from the Delawares to the Cherokees a proper proportion of the stocks now owned by the Delawares of like grade and value, which transfer shall be in part of the *pro rata* contribution herein provided for by the Delawares to the funds of the Cherokee nation; but the balance of the *pro rata* contribution by the Delawares to said fund shall be in cash or United States bonds, at their market value.

All cash and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the Delawares under the agreement, shall be invested and applied in accordance with the 23d article of the treaty with the Cherokees of August 11, 1866.

On the fulfilment by the Delawares of the foregoing stipulations, all the members of the tribe registered, as above provided, shall become members of the Cherokee nation with the same rights and immunities, and the same participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided.

And the children hereafter born of such Delawares so incorporated into the Cherokee nation shall in all respects be regarded as native Cherokees.

WILL P. ROSS, *Principal Chief*,
RILEY KEYES,
Cherokee Delegation.

his
JOHN x CONNOR,
mark.
Principal Chief,
CHARLES JOURNEYCAKE,
ISAAC JOURNEYCAKE,

his
JOHN x SARCOXIE,
mark.
Delaware Delegation.

Executed and delivered in our possession by the above-named delegates of the Cherokee and Delaware nations, at the city of Washington, in the District of Columbia, the day and year first above written.

JOHN G. PRATT.
W. A. PHILLIPS.
EDWARD S. MENAGETH.

DEPARTMENT OF THE INTERIOR, *April* 11, 1867.

The within agreement between the Cherokee and Delaware tribes of Indians, concluded on the 8th instant, and providing for uniting the two tribes as contemplated by the Cherokee treaty of July 19, 1866, is respectfully submitted to the President, with the recommendation that it be approved.

O. H. BROWNING, *Secretary.*

Approved April 11, 1867.

ANDREW JOHNSON.

12 II.—*Traverse. Filed November* 13, 1890.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and ha- not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney General.

13 III.—*Motion to Amend Petition. Filed and Allowed May* 27, 1891.

Now comes the plaintiff, by Thomas C. Fletcher, his attorney-of-record, and moves the court to order and permit him to amend his petition herein by inserting and adding thereto, as part of the fifth cause of action as therein stated, the following:

And the said plaintiff avers that the said Cherokee nation has received into its national treasury divers other large sums of money to which the said Delaware Indians are entitled to *pro rata per capita* distribution with the said Cherokees by blood, of which the Cherokee nation has unlawfully with-eld from them their *pro rata per capita* share, which sums the plaintiff is unable to state and is without other means or process than the order of this court to obtain statement of the amounts thereof. Wherefore the plaintiff prays that the said Cherokee nation may be required by order of this court to render a full, true, and complete statement and accounting for each and all the said sums of maney so received by said Cherokee nation for rent of grazing lands or from other sources and for which the said Cherokee nation has not heretofore distributed and paid to the said Delawares the *per capita* share to which they are entitled under the said treaty and agreement and for such other and further orders, judgments, and decrees as may be necessary in the premises.

THOS. C. FLETCHER,
Attorney for Charles Journeycake.

Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

14 IV.—*Separate Answer of the United States. Filed April 30, 1892.*

The defendant, The United States, separately answering the petitioner herein, says:

(1.) That it admits in common with its codefendants The Cherokee Nation that there was received by the Cherokee nation from the Cherokee Strip Live Sock Association $843,750 from the indenture of lease to the said Cherokee Strip Live Stock Association referred to, and that $593,625 thereof was paid out under a law of the Cherokee national council to the Cherokees by blood, but says that said indenture was executed without the knowledge or concern of the United States, and that no part of said monies have been received by the United States, and that the United States is in no way responsible for said transactions, and said defendants says that said monies were properly disbursed to the persons solely entitled thereto.

(2.) The United States further says that the Government is interested in said funds only to the extent that the same shall be disbursed in accordance with the agreement made with the Delaware Indians of date April 8th, 1867, under and in pursuance to a treaty made between the United States and the Cherokee nation July 19, 1866, the 15th article of which and also the said agreement are set out in full in the "agreed facts" in the record, and also as governed by the treaty between the United States and the said Delaware Indians, 1866. (14 Stat. L., p. 793.)

And the Government asks that no judgment go against the *the* United States.

Wherefore the defendant The United States invokes the judgment of the court.

JOHN B. COTTON,
Assistant Attorney General.
JOHN C. CHANEY,
Assistant Attorney.

15 V.—*Amended Answer and Cross-bill of the Defendants The Cherokee Nation and the United States. Filed January 3, 1893.*

Comes now the defendants The United States and The Cherokee Nation, and for their further and amended answer and cross-petition to the petition of the plaintiff filed herein, say:

That they deny each and every, all and singular, the material allegations in said petition contained.

That the Cherokee nation has appropriated to the Cherokees "by blood" only, no funds belonging to the Delaware Indians who were incorporated into the Cherokee nation under the terms of the agreement between said Cherokees and Delawares of April 8, 1867, but that all funds paid out per capita by the Cherokee nation to the Cherokees by blood only, since the date of said agreement, have

been the sole and separate property and funds of said Cherokees by blood, and to which the said Delawares have no right or claim of any nature or kind whatsoever.

And said defendants, further answering, say that said agreement so entered into by and between the Cherokee and Delaware nations on the 8th day of April, 1867, was not intended to, and did not in fact convey to said Delawares any interest in the lands, funds, income or domain of the Cherokee nation, other than the lands and funds specifically mentioned and set out in said agreement; that by the terms of said agreement a common fund was created, to which the Cherokees and Delawares contributed, in proportion to their respective numbers, and as to which both were to enjoy equal rights, benefits, and privileges, but into which neither Cherokees nor Delawares paid the entire fund of their respective nation, but, on the contrary, independently of which, each retained large property interests and invested funds; that by said agreement three objects were contemplated and three results were accomplished, to wit: First, the securing of a permanent home for the Delawares in the Indian Territory; second, the creation of a common fund for a common use; and third, equal civil and political rights in the government of the Cherokee nation.

And the defendants say that 985 Delaware Indians were incorporated with the Cherokee nation under said agreement; that said Delawares had, in available funds at said date of incorpation, $1,168,370.26 as their national fund, $121,824,28 of which they transferred to the Cherokee nation, under said agreement, and $157,600 they paid for land purchased, and that they re-
16 tained thereof $889,191.04 for their own separate and exclusive use and behoof, and have ever since so retained the same and the interest accruing thereon. (See statement Indian Office Report, Record.)

And the defendants also say that there are now in the Indian Territory 754 Delaware Indians who are entitled to the privileges purchased for them by the 985 originally incorporated.

And defendants further answering say that since the date of said agreement, by reason of great increase in population, and the establishment of more and better schools, and in the founding and maintenance of various charities, in which the Delawares and other affiliated Indians and adopted citizens have been permitted to share equally with the Cherokees by blood, it has become from time to time necessary to increase the revenues of said nation; that since the execution of said agreement, in order to provide the necessary revenues for such purposes, and as required by law in duly carrying into effect the provisions of article 23 of the treaty between the United States and the Cherokee nation, concluded July 19, 1866, as aforesaid, the general fund of the Cherokee nation has been increased from $1,799,824.28, the consolidated fund under said agreement, to $2,636,634.13, the present national fund, to which said increase said Delaware Indians plaintiffs herein, though abundantly able to contribute as they were in right, justice, and law bound to do, and although having separate and ample funds out of which

they have received large *per capita* payments, to Delawares by blood only, and although enjoying equally with the Cherokees all
17 the benefits arising from such increased fund, and all privileges of the schools, asylums and institutions maintained by the interest arising therefrom, have failed and wholly neglected to contribute thereto to any extent whatsoever. The total amount of such increase from 1867 to 1891, is $836,809.85, a full and detailed statement of which, with dates and amounts thereof, is as follows:

Cherokee National Fund.

1867. Annual Report Commissioner of Indian Affairs, 1867, p. 352	$703,158 72
1868. Annual Report Commissioner of Indian Affairs, 1868, p. 325	703,158 72
1869. Annual Report Commissioner of Indian Affairs, 1869, p. 495	1,098,263 32
1870. Annual Report Commissioner of Indian Affairs, 1870, p. 834–'35	1,654,263 32
1871. Annual Report Commissioner of Indian Affairs, 1871, p. 664	1,663,975 35
1872. Annual Report Commissioner of Indian Affairs, 1872, p. 436–'7	1,716,627 99
1873. Annual Report Commissioner of Indian Affairs, 1873, p. 353–'4	1,862,961 28
1874. Annual Report Commissioner of Indian Affairs, 1874, p. 151	1,887,450 28
1875.* Annual Report Commissioner of Indian Affairs, 1875, p. 147–151	2,609,199 08
1876. Annual Report Commissioner of Indian Affairs, 1876, p. 259	2,602,288 49
1877. Annual Report Commissioner of Indian Affairs, 1877, p. 270–'74	2,600,311 61
1878. Annual Report Commissioner of Indian Affairs, 1878, p. 206–'10	2,562,924 10
18 1879. Annual Report Commissioner of Indian Affairs, 1879, p. 200–'4	$2,562,924 10
1880. Annual Report Commissioner of Indian Affairs, 1880, p. 211–'14	2,575,369 21

* NOTE.—The increase in the year 1875 is accounted for by the payment to the Cherokees for lands sold to the Osages. The total value of these lands was found to be $1,099,131.41. Under the provisions of section 4 of the act of Congress of February 14, 1873, (17 Stat., 462) $95,000 of this fund was expended for an orphan asylum and literary institution, $80,000 thereof invested in United States bonds, all as in said act required (Annual Report, Indian Affairs, 1873, 350) $200,000 paid out to purchase breadstuffs under the act of March 3, 1875 (18 Stat., 443), and the balance, $724,137.41, is now in the United States Treasury to the credit of the Cherokees, in lieu of investment, under the act of Congress of April 1, 1880 (21 Stat., 70).

1881. Annual Report Commissioner of Indian Affairs, 1881, p. 243–'45	$2,624,382 38
1882. Annual Report Commissioner of Indian Affairs, 1882, p. 229–'31	2,624,982 03
1883. Annual Report Commissioner of Indian Affairs, 1883, p. 199–201	2,624,982 03
1884. Annual Report Commissioner of Indian Affairs, 1884, p. 231–233	2,624,982 03
1885. Annual Report Commissioner of Indian Affairs, 1885, p. 286–288	2,625,842 37
1886. Annual Report Commissioner of Indian Affairs, 1886, p. 280–282	2,625,842 37
1887. Annual Report Commissioner of Indian Affairs, 1887, p. 288–290	2,625,842 37
1888. Annual Report Commissioner of Indian Affairs, 1888, p. 350–352	2,625,842 37
1889. Annual Report Commissioner of Indian Affairs, 1889, p. 469–470	2,625,842 37
1890. Annual Report Commissioner of Indian Affairs, 1890, p. 424–425	2,633,047 03
1891. Annual Report Commissioner of Indian Affairs, 1891, p. pt. 2, p. 61–62	2,636,634 13

Summary.

Amount set apart for asylum	$20,000 00
Amount set apart for literary institution	75,000 00
Amount set apart to be invested	80,000 00
Amount paid out for breadstuffs	200,000 00
Amount in the Treasury in lieu of investment	724,137 41
Total	1,099,137 41

There was received as the proceeds from the sale of "strip" lands, under the seventeenth article of the Cherokee treaty of 1866, up to March 26, 1891, the sum of $593,717.54. Of this amount the sum of $13,347.97 was used as expense of survey; the sum of $75,000 was invested in United States bonds under the act of February 14, 1873; the sum of $25,000 was remitted to Agent Jones, April 27, 19 1874, to be used for asylum under same act, and $28,809.87 was invested in United States 5-20s, December 10, 1873, and the balance, the sum of $401,559.70, was used at various times for general governmental purposes.

Summary.

Amount used for surveys	$13,347 97
Amount invested under act of 1873	75,000 00
Amount used for asylum under same act	25,000 00
Amount invested in 5-20s	28,809 88
Amount used for Government purposes	401,559 79
Total	523,873 72

And defendants further say that in equity and justice said Delaware Indians should have contributed to said increase of national funds in the proportion of their numbers to the whole number of the Cherokees, to wit, 1 to 13.78, as found and determined under said agreement of 1867; that the defendant, The Cherokee Nation, is entitled to have and recover from said plaintiff its just and fair proportion of said increased national fund, to wit, sixty-three thousand seven hundred and twenty-two dollars ($63,722), being the amount of the excess over the Cherokee national fund as contemplated in said agreement ($1,799,824.28) for the several years from 1867 to 1891, both inclusive, for which sum, with the interest thereon from the respective dates of the several increases, as shown in the foregoing table, the said defendants pray judgment against the plaintiff.

The following is a detailed statement of increases of the Cherokee national fund for the several years from 1873 to 1891 in excess of the amount contemplated in said agreement, together with the amounts chargeable to the Delawares, with the interest thereon:

Amount of Cherokee national fund for the several years from 1873 to 1891.		Amount of Cherokee national fund as contemplated by the agreement between the Cherokees and Delawares.	Increase of the Cherokee national fund for each year.	Amount of such increase chargeable to the Delawares, being 1-13.78 part thereof.	Interest at 5 per cent. per annum on the amounts chargeable to the Delawares for the several years from 1873 to 1892.	Total amount principal and interest chargeable to the Delawares.
1873	$1,862,961 28	$1,799,824 28	$63,137 00	$4,581 00	$2,061 45	$6,642 45
1874	1,887,450 28	do	24,489 00	1,777 00	710 80	2,487 80
1875	2,609,199 08	do	721,748 80	52,376 00	44,519 60	96,895 60
1876	2,602,288 49	do	None	None	None	None.
1877	2,600,311 61	do	do	do	do	Do.
1878	2,562,924 10	do	do	do	do	Do.
1879	2,562,924 10	do	do	do	do	Do.
1880	2,575,369 21	do	do	do	do	Do.
1881	2,624,382 38	do	15,183 30	1,101 00	605 55	1,706 55
1882	2,624,982 03	do	599 65	43 00	21 50	64 50
1883	2,624,982 03	do	None	None	None	None.
1884	2,624,982 03	do	do	do	do	Do.
1885	2,625,842 37	do	860 34	62 00	18 60	80 60
1886	2,625,842 37	do	None	None	None	None.
1887	2,625,842 37	do	do	do	do	Do.
1888	2,625,842 37	do	do	do	do	Do.
1889	2,625,842 37	do	do	do	do	Do.
1890	2,633,047 03	do	7,204 66	522 00	52 20	574 20
1891	2,636,634 13	do	3,587 10	260 00	13 00	273 00
		1,799,824 28	836,809 85	63,722 00	48,002 60	108,724 70
Increase		836,809 85				
Total present fund		2,636,634 13				

21 And the defendants further say that of the money received by the Cherokee nation on account of lands west of the ninety-sixth degree, set aside for the Osage Indians under the act of June 5, 1872, the principal part of which went into the general fund as herein already stated, $200,000 was paid out *per capita*, in which payment said Delawares, plaintiff herein, improperly and unjustly shared (by sufferance of the Cherokee nation, on account of the destitution then existing among said Delawares, occasioned by loss of crops and to relieve their immediate wants), out of which the said Delawares so received the sum of $14,513.78, which sum the defendants are entitled in equity and fairness to recover, and for which judgment is asked against plaintiff, together with interest thereon.

And defendants further say that $300,000 appropriated by act of Congress of June 16, 1880, on account of sales of lands west of the ninety-sixth degree, was also paid out *per capita*, in which said plaintiff improperly and unjustly shared, receiving $21,770.67, which sum defendants are justly entitled to recover, and for which judgment is asked against plaintiff, together with interest thereon.

Defendants further say that on October 19, 1888 (25 Stat., 608), by misrepresentations of facts concerning the rights of plaintiff under the agreement of 1867, said Delaware Indians, plaintiffs herein, procured an act to be passed by the Congress of the United States, by which $75,000 were appropriated to the Delawares, Shawnees,

22 and freedmen residing in the Cherokee nation, and that the same was charged to the funds and credits of the Cherokees for the alleged purpose of equalizing a payment made by the Cherokee nation to Cherokees by blood only of $300,000 appropriated by act of Congress of March 3, 1883. And defendants say that said $300,000, so appropriated as last aforesaid, was on account of lands owned by the Cherokee nation west of the ninety-sixth degree upon which the United States was permitted to settle friendly Indians under the sixteenth article of the Cherokee treaty of 1866; and that said Delaware Indians had no interest therein, under said agreement or otherwise, of any kind or nature whatsoever; and had no right to be reimbursed on account of the same having been paid to the Cherokees only, as the same was the sole and exclusive property of the Cherokees, and that the charging of said $75,000 against the funds and credits of said Cherokees was wrongful and unjust; and that the defendants are entitled to recover from plaintiff the proportion of same received by the Delawares and also of the $5,000 subsequently charged against the Cherokee fund, as and for expenses in making the *per capita* payment of said $75,000 to the Delawares, Shawnees, and freedmen, to wit, a total of $12,976.21, for which sum the defendants ask judgment against plaintiff, together with interest thereon.

And defendants say that the aggregate of the sums so lawfully due from plaintiff to the defendants is $157,985.36, for which aggregate sum the defendants ask judgment against the plaintiff, together with interest on $14,513.78 thereof, from June 5, 1872; on $21,770.67 thereof, from June 16, 1880; and on $12,976.21 thereof, from October 19, 1888.

Defendants also ask for all other and further relief in the premises that may be just and equitable.

JOHN C. CHANEY,
For the United States.
MAXWELL & CHASE,
For the Cherokee Nation.

23 VI.—*Answer of Claimant to the Amended Answer and Cross-bill of Defendants. Filed January* 3, 1893.

Now comes the plaintiff herein, answering to the defendants' amended answer and cross-bill or to so much thereof as he is advised it is necessary to make answer thereof, — says—

That plaintiff admits that a certain portion of the money received by the Cherokee nation on account of lands lying west of the ninety-six- degree, set aside for the Osage Indians, was distributed *pro rata* to the citizens of the Cherokee nation, including the Delaware Indians, but denies that said money was improperly and unjustly shared by said Delawares or that it was paid out *pro rata* to said Delawares by the sufferance of said Cherokee nation on the account of the destitution then existing among said Delawares occasioned by loss of croops and to relieve their immediate wants, but declares the truth to be that said money was so paid by said nation to said Delawares in pursuance of the terms and conditions of the contract made between said Cherokee nation and said Delaware Indians on the 8th day of April, 1867, as said contract was then understood and interpreted by both parties thereto; but the plaintiff herein neither admits nor denies the allegation that the principal part of the money received by the Cherokee nation on account of the lands so set aside for the Osage Indians went into general fund and $200,000 of said money was distributed *per capita*, out of which the Delawares received the sum of $14,513.78, and leaves the defendants to make due proof of the same as set forth in their said amended answer and cross-bill.

24 And plaintiff admits that a portion of the $300,000 appropriated by act of Congress of June 16th, 1880, on account of sales of lands west of the ninety-six degree, was paid out *per capita* by the Cherokee nation and the Delawares shared therein, but denies that the Delawares improperly and unjustly so shared, and alleges the truth to be that said payments to said Delawares were made with the full understanding and belief on the part of both Cherokees and Delawares that the same was in pursuance of the said contract of April 8th, 1867, as the payment of the money received from the Osages had therefore been made; but as to the allegation that $300,000 was so paid out *per capita*, and that the Delawares received therefrom the sum of $21,770.67 as set forth in defendants' amended answer and cross-bill, this plaintiff neither admits or denies, but leaves the defendants to their strict proof thereof.

And, further answering, this plaintiff denies that the appropriation of $75,000 made by Congress for the benefit of the Delawares,

Shawnees, and freedmen, and directed to be charged to the funds and credits of the Cherokees, as set forth in the defendants amended answer and cross-bill, was procured by the Delaware Indians by the misrepresentation of facts concerning the right of said defendants.

And as to all other matters and things set forth in said amended answer and cross-bill the plaintiff neither affirms nor denies the truth thereof, but demands strict proofs concerning the same.

THOS. C. FLETCHER,
Att'y for Claimant.

25 VII.—*Stipulation for Submission of Case on Agreed Facts. Filed January* 12, 1893.

It is hereby stipulated and agreed on the part of counsel representing all the parties, that this cause is hereby submitted to the court on the following agreed facts and upon the briefs and arguments of the respective counsel:

First. That this suit is instituted by authority of the act of Congress entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee nation, and for other purposes," approved October 1, 1890.

Second. That it is provided by the treaty between the United States and the said Cherokee nation, made on the 10th day of July, 1866, and by the fifteenth article thereof, as follows:

Article 15.

The United Stated may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of the ninety-sixth degree, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee nation, they shall have a district of country set off for their use by metes and bounds equal to 160 acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

And the said tribe thus settled shall also pay into the national

fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be
26 permitted to settle east of the ninety-sixth degree of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the ninety-sixth degree of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the ninety-sixth degree of longitude.

Third. That in pursuance of the provisions of said treaty the United States did settle the Delaware Indians within the Cherokee country east of the 96° of west longitude upon the terms and conditions as specifically set forth in the following agreement between said Cherokee nation and the Delaware Indians, as approved by the President of the United States, to wit:

Articles of agreement made this 8th day of April, A. D. 1867, between the Cherokee nation, represented by William P. Ross, principal chief; Riley Keyes, and Jesse Bushyhead, delegates duly authorized, parties of the first part, and the Delaware tribe of Indians, represented by John Connor, principal chief; Charles Journeycake, assistant chief; Isaac Journeycake, and John Sarcoxie, delegates for and on behalf of said Delaware tribe, duly authorized, witnesseth:

Whereas by the fifteenth article of a certain treaty between the United States and the Cherokee nation, ratified August 11, 1866, certain terms were provided, under which friendly Indians might be settled upon unoccupied lands in the Cherokee country
27 east of the line of 96° of west longitude, the price to — paid for such lands to be agreed on by the Indians to be thus located and the Cherokee nation, subject to the approval of the President of the United States; and whereas by a treaty between the United States and the Delaware tribe of Indians, ratified August 10, 1866, the removal of the said Delawares to the Indian country south of Kansas was provided for; and, in the fourth article whereof, an agreement was made by the United States to sell to the Delawares a tract of land, being part of a tract, the cession of which by the Cherokees to the United States was then contemplated; and whereas no such session of land was made by the Cherokees to the United States, but, in lieu thereof, terms were provided, as hereinbefore mentioned, under which friendly Indians might be settled upon their lands; and whereas a full and free conference has been

had between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee nation:

Now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfillment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to one hundred and sixty acres for each individual of the Delaware tribe, who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elect to remove to the "Indian country," to which list may be added, only with the consent of the Delaware council, the names of such other Delawares as may, within one month after the signing
28 of this agreement, desire to be added thereto, and the selection of the lands to be purchased by the Delawares may be made by said Delawares in any part of the Cherokee reservation east of said line of 96°, not already selected and in possession of other parties, and in case the Cherokee lands shall hereafter be allotted among the members of said nation, it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivisions when surveys are made (that is to say, one hundred and sixty acres for each individual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee nation, nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee nation imposed upon native citizens thereof.

Provided that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee nation.

And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees from the Delaware funds now held or hereafter received by the United States, a sum of money equal to one dollar per acre for the whole amount of one hundred and sixty acres of land for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto heretofore provided for.

And the Secretary of the Interior is authorized and requested to sell any United States stock belonging to the Delawares to procure funds necessary to pay for said lands; but in case he shall not feel authorized under existing treaties, to sell such bonds belong-
29 ing to the Delawares, it is agreed that he may transfer such

United States bonds to the Cherokee nation, at their market value, at the date of such transfer.

And the said Delawares further agree, that there shall be paid from their funds now or hereafter to come into possession of the United States, a sum of money which shall sustain the same proportion to to the existing Cherokee national fund that the number of Delawares registered as above mentioned and removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee nation. And for the purpose of ascertaining such relative numbers, the registers of the Delawares herein referred to, with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares, and an accurate census of the Cherokees residing in the Cherokee nation shall be taken under the laws of that nation within four months, and properly certified copies thereof filed in the Office of Indian Affairs, which shall be the basis of calculation as to the Cherokees.

And that there may be no doubt hereafter as to the amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agree by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000.

And the Delawares further agree, that in calculating the total amount of said national fund there shall be added to the said sum of $678,000 the sum of $1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee national fund $1,678,000; and this last-mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund.

Provided, that as the $678,000 of funds now on hand be-
30 longing to the Cherokees is chiefly composed of stocks of different values, the Secretary of the Interior may transfer from the Delawares to the Cherokees a proper proportion of the stocks now owned by the Delawares of like grade and value, which transfer shall be in part of the *pro rata* contribution herein provided for by the Delawares to the funds of the Cherokee nation; but the balance of the *pro rata* contribution by the Delawares to said fund in cash or United States bonds, at their market value.

All cash, and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the Delawares under the agreement shall be invested and applied in accordance with the 23d article of the treaty with the Cherokees of August 11, 1866.

On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become members of the Cherokee nation, with the same rights and immunities, and the same participations (and no other) in the national funds as native Cherokees, save as hereinbefore provided.

And the children hereafter born of such Delawares so incorpo-

rated into the Cherokee nation, shall in all respects be regarded as native Cherokees.

WILL P. ROSS, *Principal Chief,*
RILEY KEYES,
Cherokee Delegation.

his
JOHN x CONNOR,
mark.
Principal Chief,
CHARLES JOURNEYCAKE,
ISAAC JOURNEYCAKE,

his
JOHN x SARCOXIE,
mark.
Delaware Delegation.

31 Executed and delivered in our possession by the above-named delegates of the Cherokee and Delaware nations, at the city of Washington, in the District of Columbia, the day and year first above written.

JOHN G. PRATT.
W. A. PHILLIPS.
EDWARD S. MENAGETH.

DEPARTMENT OF THE INTERIOR, *April* 11, 1867.

The within agreement between the Cherokee and Delaware tribes of Indians, concluded on the 8th instant, and providing for uniting the two tribes as contemplated by the Cherokee treaty of July 19, 1866, is respectfully submitted to the President, with the recommendation that it be approved.

O. H. BROWNING,
Secretary.

Approved April 11, 1867.

ANDREW JOHNSON.

That the said Delaware Indians removed to the Cherokee country, and have ever since resided there, and have in every respect fully complied with the agreement on their part.

Fourth. That for all the purposes of this suit, the statement certified by Robert B. Ross, treasurer of the Cherokee nation, a copy whereof is herewith submitted, may be taken as true and correct as to amounts so received and paid out by the Cherokee nation on account of rents upon leases of grazing privileges on the land of said nation lying west of 96° of longitude.

32 The statement is as follows:

Statement Showing Total Amount of Moneys Received by the Cherokee Nation from the Cherokee Strip Live Stock Association.

To amount received under an act of the national council approved May 19th, 1883	$500,000 00
To amount collected by treasurer under chapter XI, art. II, sec. 10, compiled laws	43,750 00
To amount received under an act of the national council approved Dec. 4th, 1888	300,000 00
	$843,750 00

By amount paid *per capita* to Cherokees by blood under an act of the national council approved April 28th, 1886	295,000 00
By amount paid taking *per capita* census	5,000 00
By amount paid *per capita* claims under an act of the national council approved Dec. 13th, 1886	2,611 25
By amount paid *per capita* claims under an act of the national council approved Dec. 20th, 1886	111 65
By amount transferred to school fund under an act of the national council approved Dec. 13th, 1886	21,064 50
By amount transferred to general fund under an act of the national council approved Dec. 11th, 1886	14,796 00
By amount transferred to school fund under an act of the national council approved Dec. 20th, 1886	3,000 00
By amount transferred to school fund under an act of the national council approved May 21st, 1887	58,416 60
By amount transferred to general fund under an act of the national council approved Dec. 8th, 1888	35,000 00
By amount transferred to school fund under an act of the national council approved May 21st, 1887	1,583 40
By amount transferred to general fund under an act of the national council approved Nov. 24th, 1888	15,000 00
By amount transferred to school fund under an act of the national council approved Nov. 24th, 1888	33,416 60
By amount transferred to orphan fund under an act of the national council approved Nov. 24th, 1888	15,000 00
By amount transferred to general fund under an act of the national council approved Dec. 8th, 1888	35,000 00
By amount paid *per capita* to Cherokees by blood, under an act of the national council of Nov. 26th, 1890	298,625 00
By amount as expenses in making *per capita* payment	1,375 00
By amount paid treasurer in collecting the $43,750.00 under chapter XII, art. II, sec. 11, Compiled Laws.	8,750 00
	843,750 00

I, Rob't B. Ross, treasurer of the Cherokee nation, hereby certify that the foregoing is a true statement of all moneys received from the Cherokee Strip Live Stock Association for grazing privileges on lands west of the 96° of west longitude, and the disposition made thereof, as shown by the records of this department.

Witness my hand and the seal of this department this 13th day November, 1861.

[SEAL.]

ROB'T B. ROSS,
Treasurer Cherokee Nation.

This stipulation is signed and entered into by and between the counsel hereto this 24th day of December, 1891.

JOHN C. CHANEY,
For the Government.
MAXWELL & CHASE,
For the Cherokees.
THO. C. FLETCHER,
For the Delawares.

33 VIII.—*Motion of Defendants for Certification of Certain Evidence to the Supreme Court of the United States. Filed December* 20, 1893, *and Allowed and the said Evidence Annexed Hereto.*

Now comes the said defendants and move the court to certify to the Supreme Court of the United States as part of the record in this case the following evidence, to wit:

1st. So much of the letter of the Commissioner of Indian Affairs of December 15, 1892, transmitted by the Secretary of the Interior, as is included in statements "B" and "C."

2nd. The answer of the Cherokee nation, dated May 3, 1892.

Both of the above being parts of evidence filed on behalf of the defendants.

3rd. Record of the filing of a motion for facts, with suggestions of facts to be found, and the order of the court with reference thereto as endorsed thereon.

MAXWELL AND CHASE,
Attorneys for Cherokee Nation.

Filed and allowed December 20, 1893.

34 The following is the evidence set out in aforesaid motion allowed by the court:

Letter of Commissioner of Indian Affairs & Statements "B" & "C."

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *December* 15, 1892.

The Secretary of the Interior.

SIR: By your reference of the 4th of May last, for report, I have the honor to be in receipt of a communication from John Randolph, assistant clerk of Court of Claims, asking to be furnished with any

information or papers supposed to be on file in this department, as set forth in accompanying rule allowed by Chief Justice Richardson, December term, 1891: Charles Journeycake, principal chief of the Delaware Indians, plaintiff, *v.* The United States and Cherokee Nation, defendants (No. 16837), and Johnson Blackfeather, the principal chief of the Shawnee Indians, plaintiff, *v.* The United States and The Cherokee Nation, defendants (No. 16856).

The defendants, The Cherokee Nation, by Maxwell & Chase, its attorneys, and The United States, by John C. Chaney, its attorney, move the court for a call on the honorable Secretary of the Interior for information for use in the hearing of their cause, and propound several questions, under fifteen paragraphs, concerning the lands and money credit of the Cherokee nation and the Delaware and Shawnee Indians, their numbers at certain dates, etc.

In reply to the several questions contained therein I have the honor to report as follows, the replies thereto running in numerical order, as set forth in the rule of the court, viz:

No. I. The amount of lands, estimated as near as possible, owned by the Cherokee nation on the 8th day of April, 1867, also amount of funds held by the Government belonging to said nation at that date are as follows:

"Strip" lands, ceded by the seventeenth article of treaty of 1866 (about)	acres..	435,000
Neutral lands, ceded by same article (about)	do. ..	800,000
Lands lying east of ninety-sixth degree (about)	do. ..	5,000,000
Lands lying west of same (about)	do. ..	8,000,000
National funds, as stipulated with Delawares at said date		$678,000

No. II. Amounts since added to said national fund and from what sources and at what dates will be found in statement herewith marked A.

Nos. III, IV, and V. The answers to the questions contained in these three paragraphs will be found in the accompanying statement marked B.

No. VI. The amount received from sale of "strip" lands, under the seventeenth article of the treaty of July 19, 1866, and the disposition made thereof in detail will be found in accompanying statement marked C.

No. VII. The amount received on account of the sale of Cherokee lands to the Osages and the disposition made thereof in detail will be found in accompanying statement marked D.

No. VIII. The amount received by the Cherokee nation on account of sale of lands to the Poncas was $48,389.46, and was carried to the credit of the several funds of the Cherokee nation at dates and in amounts as shown on statement herewith marked A.

No. IX. The number of Shawnees incorporated with the Cherokees under the agreement between them dated June 7, 1869, was 772, and the number of Cherokees at that date estimated at 14,000 persons.

No. X. The basis of calculation used to determine the amount the Shawnees were to pay for such interest as they secured with the

Cherokees under said agreement is not set forth in said agreement and is not known to this office.

No. XI. The amount in detail of the stocks, bonds, etc., transferred from the Shawnee funds to the Cherokee funds and the date of such transfer will be found in the accompanying statement marked E and in statement A.

No. XII. The amount of the Cherokee national fund at the date of said agreement was $1,098,468.32.

No. XIII. The amount of funds and credits of the Shawnees at the date of said agreement and the amount of funds and credits received by said Indians since that date and from what source and the disposition made thereof and what, if any, funds are now to their credit, will be found in accompanying statement F.

35 No. XIV. The amount of interest arising annually from the various bonds, stocks, securities, etc., belonging to the Cherokee nation from the year 1867 to the year 1892, both inclusive, as shown by the annual reports of the Indian Office, will be found in accompanying statement G.

No. XV. The certified copy of the patent issued to the Cherokee nation December 31, 1838, cannot be furnished by this office. Application therefor should be made to the Commissioner of the General Land Office.

The letter of the assistant clerk of the Court of Claims and rule of the court is respectfully returned herewith.

Very respectfully, your obedient servant,

T. J. MORGAN,
Commissioner.

* * * * * * *

STATEMENT B.

Statement of the amount of funds and credits of the Delawares at the date of the agreement of April 8, 1867, between the Delawares and the Cherokee nation, viz:

Delaware General Fund.

Florida 7's	59,000 00
Georgia 6's	2,000 00
Louisiana 6's	4,000 00
Missouri 6's	10,000 00
North Carolina 6's	121,000 00
South Carolina 6's	1,000 00
United States (loan of 1862) 6's	210,300 00
Leavenworth, Pawnee and Western Railroad Company 6's	250,000 00
United States issue to Union Pacific railway (E. D.) 6's	30,000 00
Total	687,300 00

Delaware School Fund.

United States (loan of 1862) 6's	11,000 00
Deposis to the credit of the Delawares in the U. S. Treasury, at 5 per cent. per annum, in lieu of bonds abstracted from the Secretary of the Interior in 1861 (12 Stats., 539)	423,990 26
Fulfilling treaty with Delawares: Value of thirty-six sections of land set apart by treaty of 1829 for education, pursuant to resolution June 13, 1839, and 5th article treaty of May sixth, 1856	46,080 00
Total assets, Ap'l 8, 1867	1,168,370 26
Amount of funds arising from the Delaware treaty of July 4, 1866	274,297 73

The present amounts of the Delaware funds are as follows, viz:

Delaware General Fund.

Amount in the U. S. Treasury in lieu of investment at 5 per cent. per annum	$406,171 32
Florida 7's	27,000 00
North Carolina 6's	3,000 00
Kansas Pacific 6's	25,000 90
Total	461,455 22

Delaware School Fund.

Amount in the U. S. Treasury in lieu of investment at 5 per cent. per annum	5,500 00
Interest on Delaware school fund	7,933 79
Aggreate	474,889 01

Amount to the Credit of Delawares Prior to the Per Capita Payment Authorized to be Made Them under the Act of M'ch 3, '91.

Delware general fund.

Amount in the U. S. Treasury in lieu of investment at 5 per cent. per annum	$753,902 64
Kansas Pacific 6's	49,283 90
Florida 7's	53,000 00
No. Carolina 6's	7,000 00
Interest on Delaware general fund	26,004 50
Total	889,191 04

36 *Delaware School Fund.*

Amount in the U. S. Treasury in lieu of investment at 5 per cent. per annum	11,000 00
Interest on Delaware school fund	15,108 89
Aggregate	915,299 93

Statement of the gross amount of Delaware funds paid out *per capita* under the act of March 3, 1891, viz:

Delaware General Fund.

One-half of the amount in the U. S. Treasury in lieu of investment at 5 per cent. per annum	$376,951 32
One-half of the proceeds of sale of $24,000 currency 6's and premium thereon, $4,440	14,220 00
One-half of the face value of $26,000 Florida 7's and $4,000 North Carolina 6's	15,000 00
One-half of interest on Delaware general fund	13,002 25
	419,173 57

Delaware School Fund.

One-half of the amount in the U. S. Treasury in lieu of investment at 5 per cent. per annum	5,500 00
One-half of interest on said fund	7,554 45
Total	432,228 02

The number of Delawares incorporated with the Cherokees under the agreement of April 8, 1867, were 985 and the Cherokees 13,573—and the ratio which one bore to the other was as one to thirteen seventy-eight one-hundredths, which ratio formed the basis upon which was determined the amount to be paid to the Cherokees by the Delawares for an equal interest in the national fund of the Cherokees, viz., $678,000 and $1,000,000, the estimated value of the neutral lands ceded by the 17th article of the Cherokee treaty of July 19, 1866.

The amount of land purchased by the Delawares from the Cherokees under their agreement was 157,600 acres, which, at $1.00 per acre, aggregated the sum of $157,600, and the amount paid to the Cherokee nation for an interest in national funds, $121,824.28, aggregating the sum of $279,424.28.

The funds transferred were as follows:

Amount of non-paying bonds of several Southern States, transferred at par as per agreement	$32,000 00
Amount of paying stocks of the State of Missouri	2,000 00
U. S. bonds issued to Union Pacific R. R. Co., Eastern division, transferred at market rate, $1.06⅞	245,424 28
Total	279,424 28

These funds were transferred to the credit of the Cherokees May 13, 1869.

Statement Showing the Receipts and Disbursements on Account of Sales of the Cherokee Strip, in the State of Kansas, under the 17th Article of the Cherokee Treaty of July 19, 1866.

1873.								1873.			
Jan. 31	To warrant No.	559,	sales of	lands	.....	$3,063 50		By amount paid for expenses of survey	.....	$13,347 97	
Feb. 17	" "	563,	"	"	.....	3,050 85	Sep. 24	" amount invested in U. S. loan of 1865 for Cherokee Asylum, per act of February 14, 1873	.....	26,796 87	
Mar. 12	" "	569,	"	"	.....	2,031 47					
Jun- 11	" "	575,	"	"	.....	4,460 00					
Jun- 12	" "	577,	"	"	.....	6,449 40	Oct. 27	" amount invested in U. S. loan of 1865 for Cherokee asylum, per act of February 14, 1873	.....	48,203 13	THE UNITED STATES ET AL. VS.
Aug. 15	" "	590,	"	"	.....	12,847 25	Oct. 28				
Sep. 13	" "	596,	"	"	.....	8,242 37	Oct. 29				
Oct. 7	" "	599,	"	"	.....	63,874 74	Dec. —	" amount invested in U. S. loan of 1865, 5-20s	.....	28,809 87	
Nov. 1	" "	602,	"	"	.....	38,147 17					
Dec. 6	" "	604,	"	"	.....	5,566 70	1874.				
1874.							Jan. 20	" amount used in payment of national warrants	.....	4,428 11	
3	" "	608,	"	"	.....	20,971 24					
May 18	" "	614,	"	"	.....	10,231 91	Apr. 27	" amount remitted to J. B. Jones, Indian agent for Cherokee asylum, per act February 14, 1873	.....	25,000 00	
Aug. 21	" "	628,	"	"	.....	25,029 16					
Nov. 4	" "	633,	"	"	.....	82 45	July 1	" amount remitted to John B. Jones, Indian agent	.....	32,350 65	
1875.											
Feb. 1	" "	639,	"	"	.....	9,307 82	Oct. 20	" amount remitted to G. W. Ingalls, Indian agent	.....	25,029 16	
May 25	" "	651,	"	"	.....	6,847 38					
Aug. 17	" "	664,	"	"	.....	971 35					
Nov. 16	" "	669,	"	"	.....	1,080 68	1875.				
1876.							Mar. 10	" amount remitted to D. W. Bushyhead, treasurer	.....	1,325 50	
Feb. 17	" "	676,	"	"	.....	1,065 38					
May 15	" "	681,	"	"	.....	463 23	Mar. 19	" amount to G. W. Ingalls, agent	.....	8,064 77	
Aug. 9	" "	696,	"	"	.....	1,088 42	1876.				
Nov. 11	" "	704,	"	"	.....	34 00	Oct. 18	" treasurer Cherokee nation	.....	11,516 44	
1877.							1877.				
Feb. 15	" "	711,	"	"	.....	1,187 22	Nov. 24	" " " "	.....	2,021 38	
May 26	" "	721,	"	"	.....	8 84	1878.				
Jul- 30	" "	738,	"	"	.....	791 32	Feb. 25	" " " "	.....	8 84	
Nov. 10	" "	742,	"	"	.....	8 84	Aug. 1	" " " "	.....	1,781 57	
1878.							1879.				
May 14	" "	755,	"	"	.....	1,781 57	Jan. 28	" " " "	.....	9,191 28	

Aug.	12	"	"	779,	"	"	.....	4,643	35	Apr.	26	" T. R. Williams, amount of Cherokee warrant..... 3,847 00
Nov.	26	"	"	784,	"	"	.....	4,547	93	Aug.	21	" treasurer Cherokee nation..... 4,863 41
1879.										Nov.	28	" " " " 24,735 44
Feb.	11	"	"	789,	"	"	.....	10,022	70	1880.		
June	4	"	"	797,	"	"	.....	23,420	25	Jan.	14	" Wm. A. Phillips, agent 5,000 00
Aug.	22	"	"	815,	"	"	.....	3	00	Jan.	31	" treasurer Cherokee nation..... 16,087 77
Nov.	21	"	"	820,	"	"	.....	21,087	77	Feb.	12	" " " " 18,174 87
1880.										Aug.	16	" " " " 18,856 32
Feb.	5	"	"	825,	"	"	.....	18,174	87	Sep.	22	" " " " 20,831 59
May	20	"	"	834,	"	"	.....	18,856	32	1881.		
Aug.	20	"	"	861,	"	"	.....	20,831	59	Jan.	17	" " " " 6,288 57
Nov.	15	"	"	868,	"	"	.....	6,288	57	Mar.	2	" " " " 15,890 74
1881.										Sept.	2	" " " " 5,014 45
Feb.	24	"	"	875,	"	"	.....	58	92	Nov.	22	" " " " 5,354 58
Feb.	24	"	"	877,	"	"	.....	12,831	82	1882.		
May	24	"	"	884,	"	"	.....	5,354	58	Jan.	31	" " " " 10,534 02
Aug.	24	"	"	911,	"	"	.....	5,014	45	Feb.	27	" " " " 6,606 12
Nov.	28	"	"	918,	"	"	.....	10,534	02	Jul-	27	" " " " 6,784 55
1882.										Sep.	12	" " " " 6,510 53
Feb.	17	"	"	923,	"	"	.....	6,606	12	1883.		
May	22	"	"	927,	"	"	.....	6,874	55	Feb.	7	" " " " 6,388 88
Aug.	31	"	"	954,	"	"	.....	6,510	53	Mar.	31	" " " " 17,402 27
Nov.	16	"	"	956,	"	"	.....	6,388	88	1884.		
1883.										Jun-	14	" " " " 40,000 00
Feb.	24	"	"	964,	"	"	.....	17,402	27	Dec.	20	" " " " 15,000 00
1884.										1886.		
June	9	"	"	1007,	"	"	.....	40,000	00	Jan.	2	" " " " 20,000 00
Dec.	8	"	"	1032,	"	"	.....	15,000	00	1887.		
1885.										Feb.	18	" " " " 11,737 07
Dec.	1	"	"	1066,	"	"	.....	20,000	00	1891.		
1887.										Apr.	28	" Wm. S. Phillips, services as attorney..... 1,984 38
Feb.	1	"	"	16,	"	"	.....	11,737	07			" treasurer Cherokee nation..... 17,859 44
1891.												
Mar.	26	"	"	30,	"	"	.....	19,843	82			
		Total receipts.....						543,717	54			543,717 54

38 *Answer of Cherokee Nation.*

TAHLEQUAH, CHEROKEE NATION,
IND. T., *May* 3, 1892.

I, E. E. Starr, treasurer of the Cherokee nation, hereby officially certify that the records of this office show that the Delaware Indians, since the agreement between them and the Cherokees of April 8, 1867, have shared equally with native Cherokees in all funds of the Cherokee nation appropriated and used for general governmental purposes, including general expenses, school funds, orphan funds, asylum funds, and all other funds used for public and general expenses; and that they have also enjoyed all civil and political rights enjoyed by native Cherokees.

That since the agreement of June 7, 1869, between the Cherokees and Shawnees, the said Shawnees have shared equally with native Cherokees in all funds of the Cherokee nation appropriated and used for general governmental purposes, including general expenses, school funds, orphan funds, asylum funds, and all other funds used for public and general expenses, and that they also have enjoyed all civil and political rights enjoyed by native Cherokees.

That since the treaty of 1866, the Cherokee freedmen have shared equally with native Cherokees in all funds appropriated and used for general governmental purposes, including school funds, orphan funds, asylum funds, and all other funds used for public and general expenses, and that they have likewise enjoyed all civil and political rights enjoyed by native Cherokees.

That of the $500,000 received under the act of the national council of May 19, 1883, from the Cherokee Strip Live Stock Association, the sum of $200,000 was used for general governmental purposes, and $295,000 paid out *per capita* to Cherokees by blood, and that of said amount so received the sum of $5,000 was expended in taking the census upon which said *per capita* payment was made.

That the sum of $43,750 — collected for the use of lands west of the ninety-sixth degree, under the provisions of the tenth subdivision of section 10, article 2, chapter 12, Compiled Laws, page 251. Of this amount the sum of $8,750 (20 per cent.) was retained by treasurer as fees for collection, and the residue was placed to the general fund by act of the national council approved December 8, 1888. The amount placed to general fund was $35,000, and was used for general purposes. No part was paid *per capita*.

That of the amount of $300,000 received from the Cherokee Strip Live Stock Association under the act of the national council of December 4, 1888, the sum of $298,625 was paid out *per capita* to Cherokees by blood, and that the sum of $1,375 was used to meet the expenses incident to such payment; that the sum of $300,000 appropriated by the act of Congress of June 16, 1880, on account of the Cherokee lands west of the ninety-sixth degree, was paid out *per capita*, and that the Delawares, Shawnees, and freedmen participated therein equally with the Cherokees by blood.

That the sum of $200,000 appropriated by the act of Congress of

March 3, 1875, out of the funds received on account of lands sold to the Osage Indians and held in trust by the United States, was distributed in accordance with the provisions of the act of the national council of November 19, 1874, and that the Delawares, Shawnees, and freedmen shared in the distribution thereof, equally with Cherokees by blood, and that the said Delawares, Shawnees, and freedmen shared equally with native Cherokees in all the proceeds arising from the disposition of the "strip" lands under the seventeenth article of the treaty of July 19, 1866, and that the said Delawares, Shawnees, and freedmen shared equally with native Cherokees in all the proceeds derived from the sale of "neutral" lands ceded by the first clause of the seventeenth article of the Cherokee treaty of July 19, 1866.

Witness my hand and seal of this department, this the 3d day of May, 1892.

[SEAL.]

E. E. STARR,
Treasurer Cherokee Nation.

TAHLEQUAH, CHEROKEE NATION,
IND. T., *May* 3, 1892.

I, C. J. Harris, principal chief of the Cherokee nation, do hereby officially certify that the facts contained in the foregoing certificate of the treasurer of this nation are true and correct.

[SEAL.]

C. J. HARRIS,
Principal Chief, Cherokee Nation.

39 *Order of Court on Motion of Defendants for Facts.*

It appears of record that on the 16th day of June, 1893, The United States and The Cherokee Nation, defendants, by their respective counsel, filed a motion asking the court to find certain facts, with suggestion of facts to be found, and that on the 22d day of June, 1893, the court made the following order on said motion, to wit:

The defendants' motion for a finding of facts is overruled for the reasons set forth in the opinion of the court heretofore filed in this case.

By the court:

WILLIAM A. RICHARDSON,
Chief Justice.

June 22, 1893.

40 IX.—*Opinion of the Court. Filed April* 24, 1893.

NOTT, J., delivered the opinion of the court:

Communal property is an estate which is neither national nor individual; that is to say, where the fee is vested neither in a person or number of persons in their own right nor in a body corporate or politic. In this country it is substantially unknown, less so than in England, where a semblance to communal property in commons and right of common still has a practical existence.

It is, indeed, not improbable that many of our troubles with the Indian tribes have sprung from the fact that our treaty-making commissioners and agents were ignorant of its nature, and of the fact that all Indian lands were communal property. We have, indeed, in this country communities, so called, religious or social, but there the fee of real property is vested in an artificial person, a corporation, or in trustees. We have also joint tenants and tenants in common; but there the fee is in the individual or a number of individuals, and the estate of each passes, according to its nature, to his successor or his heirs. Apart from the Indian tribes, communal property is with us a thing unknown.

The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners. When the Government of the United States sells a tract of land no citizen has a direct personal interest in the property. He may as a matter of public policy approve of the sale or condemn it, but there is nothing in the land which he can call his own.

The Indian, on the contrary, acknowledges no authority in his chiefs and headmen to dispose of his individual rights as a communal owner; and even where a majority of a tribe sanction a sale, it is in his eyes the case of a majority taking away the property of the minority and disposing of it without their consent. The public domain of the United States is in legal effect the corporate property of the Government; the lands of the Indian tribes are something in which every individual of the community has a right of use and enjoyment as absolute and complete as that of any other person in the world.

41 The constitution and laws of the Cherokees, since that people came within the confines of civilization, have followed, in a limited extent, the traditions and usages of the race, and have embodied in them in varying degrees the fundamental principle and characteristics of communal property.

The preamble of their constitution, September 6, 1839, like that of the Constitution of the United States, sets forth the general purpose of the instrument:

We, the people of the Cherokee nation, in national convention assembled, in order to establish justice, insure tranquility, promote the common welfare, and to secure to ourselves and our posterity the blessings of freedom—acknowledging with humility and gratitude, the goodness of the Sovereign Ruler of the universe, in permitting us so to do, and imploring His aid and guidance in its accomplishment—do ordain and establish this constitution for the government of the Cherokee nation.

The constitution then takes up (and it is most significant that it does so by its first article) the subject of paramount importance in

the Indian mind—of more importance than the form of government, than the right of representation, than the right of trial by jury, or of *habeas corpus*, or of any of those principles of civil liberty, which, in the Anglo-Saxon mind are held supreme, the subject of their lands:

SEC. 2. The lands of the Cherokee nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them: Provided, that the citizens of the nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in any manner whatever, to the United States, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this nation, and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, that the national council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the nation, on memoralizing the national council for such readmission.

Moreover, the national council shall have power to adopt such laws and regulations, as its wisdom may deem expedient and proper, to prevent citizens from monopolizing improvements with the view of speculation.

The amendment of 1866 modified the foregoing as follows:

SEC. 2. The lands of the Cherokee nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the provisions of article 20th of the treaty of 19th of July, 1866, between the United States and the Cherokee nation.

With these restrictive provisions should be considered the brief grant which the constitution contains of legislative power:

SEC. 14. The national council shall have power to make all laws and regulations which they shall deem necessary and proper for the good of the nation, which shall not be contrary to this constitution.

The legislation of the Cherokees recognizes again and again the communal character of the seizin or occupancy of the land. It is not "lawful for any citizen of the Cherokee nation to sell any farm or other improvement in said nation to any person other than a '*bona fide*' citizen thereof"; nor "to rent any farm or other improvement to any other person than a citizen of the Indian Territory." (Revised Code, 1874, art. XXI, sec. 112, p. 234.) "No person shall be permitted to settle or erect any improvement within one-fourth of a mile of the house, field, or other improvement of another citizen without his, her, or their consent, under the penalty of forfeiting such improvement and labor for the benefit of the original settler; provided, it may be lawful however, where a settler has a field one-half mile or more from his residence, and where there may be a spring or running water and

timber, for another citizen to improve and settle one hundred yards from such field so situated." (Act 24th September, 1839, *id.*, p. 249.)

The law regulating intermarriage with white men or foreigners provides that should a citizen of the United States or any foreign country "become a citizen of the Cherokee nation by intermarriage" and be left a widower, he shall continue to enjoy the rights of citizenship unless he shall marry a person "having no rights of Cherokee citizenship by blood; in that case, all of his rights acquired under the provisions of this act shall cease." (Revised Code, 1874, art. XV, sec. 74, p. 223.) If he abandons his wife, he "shall thereby forfeit every right and privilege of citizenship," and shall "be removed from the nation." (Sec. 75.) There is also a significant provision attached to the law allowing citizenship by intermarriage which shows how clearly the communal character of the property of the nation is recognized, that is to say, property of which all the citizens of the nation are joint owners and in which each has a direct personal interest:

Provided, also, That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation, unless such adopted citizen shall pay into the general fund of the National Treasury a sum of money to be ascertained and fixed by the national council equal to the "*pro rata*" share of each native Cherokee, in the lands and vested wealth of the nation, estimated at five hundred dollars (*id.*, p. 224).

With these inbred views concerning their communal property and this traditional belief in their own direct personal interest in all property held by the nation, it is not a matter for wonder that a controversy should have arisen between those who are Cherokees by blood and those who are Cherokees by adoption. This controversy, so far as it is involved in the present case, relates to the proceeds of lands sold by the nation to the United States, and to the rents of lands leased for grazing purposes to certain so-called cattle associations, and to moneys derived from the sale of property, but held in trust for the benefit of the Cherokee nation by the United States. The controversy is brought before the court by a suit in which the Delawares, who became members of the Cherokee nation in 1867, are claimants in fact, and the Cherokee nation is defendant.

The United States, as trustees of one or both of the parties, are also joined as defendants, and all of the parties have appeared and been heard by counsel. The jurisdiction of the court is derived from an act of Congress (act 1st October, 1890, 26 Stat. L., p. 636) empowering the court "to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians who are settled and incorporated into the Cherokee nation," and from the voluntary appearance of the respective parties. It should be noted that the idea of subjecting these foreign litigants to the jurisdiction of this court did not originate in Congress. The proposition to submit the controversy to the arbitrament of the judiciary of the United States came from the Cherokee nation in a com-

munication addressed by their delegates to the Senate Committee on Indian Affairs, June 19, 1890. It should also be noted that the laws of the Cherokees recognize the liability of the Government to the suit of the citizen without limitation or restriction, going even to the full extent of the civil law. (Brown's case, 6 C. Cls. R., 171, 198.)

43 The Cherokee nation shall be liable to all persons whatever, citizens of the nation, having claims at law or equity against her, to the same extent as individual persons are liable to each other, and may be sued by any citizen having a cause of action. (Code 1874, p. 240, sec. 130.)

The claim of the Delaware springs out of an agreement dated the 8th April, 1867, whereby they were admitted into and became a part of the Cherokee nation. Without adverting to particular words and phrases, it is manifest that that agreement was made for the attainment of three principal objects: First. For the purchase by the Delawares of homes within the Cherokee country. Second. For their joint ownership and equal participation in the national fund held in trust by the United States for the benefit of the Cherokees. Third. For the adoption of the Delawares and their children after them as "members of the Cherokee nation with the same rights and immunities" "as native Cherokees."

The instrument so brought before the court for construction is a contract entered into by two parties of communal owners, and its subject of bargain and sale consists of two kinds of communal property. One of these was a fund in the Treasury held by the Government of the United States in trust for the benefit of the Cherokee people. It had been derived from the sale of Cherokee lands, and had been reserved from moneys which would otherwise have been paid *per capita* to the communal owners; and it represented and was in every sense, if not in form, the communal property of the Cherokee people. Manifestly, if the Delawares were to be incorporated into and become a part of the Cherokee nation with all the rights and immunities of native Cherokees, it would be but just that they should contribute to this fund in whose benefits they would share.

The agreement accordingly provides that the Delawares shall contribute a proportionate amount and be thereafter jointly and severally and equally interested with the Cherokees in the augmented fund. The numbers of the communal owners was fixed or made ascertainable by the agreement, the amount of the primary fund in the treasury was known, the amount to be paid in was a simple matter of calculation, and the result was that the arrangement left the individual interests of the communal owners precisely what they were before, each Delaware and each Cherokee continuing to receive, directly or indirectly, *per capita* the same dividend that he would have received if the merger of their funds had not taken place. This part of the agreement has not been susceptible of misconstruction and concerning it no controversy has arisen.

There being thus established one communal fund, to which all were to contribute equally and in which all were equally to share

the agreement further provides for the sale of land in the Cherokee country to the Delawares which should furnish homesteads for these new inhabitants and future citizens of the Cherokee nation; and it is this part of the agreement from which the controversy of the case has sprung.

This land which the Cherokees "agree to sell to the Delawares for their occupancy" is to be enough for the agricultural homes of the new inhabitants and no more. The quantity is fixed at and limited to "one hundred and sixty acres of land for each individual of the Delaware tribe," that is, "of the Delawares who elect to remove to the 'Indian country.'" The "selections of the lands to be
44 purchased by the Delawares may be made by said Delawares in any part of the Cherokee reservation east of the line of the 96th degree of west longitude, not already selected and in the possession of other parties."

In case of the future allotment of land contemplated by the first amendment of the constitution, 1866 (*supra*), and the 20th article of the treaty with the United States, 1866, "it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivisions, when surveys are made (that is to say, 160 acres for each individual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee nation." It is also guaranteed that "the continued ownership and occupancy of said lands by any Delaware" shall not "be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee nation imposed upon the native citizens thereof." Finally, while individual rights are guaranteed and the future allotment of land in severalty is contemplated, the present communal character of the estate granted is carefully guarded by a general proviso, "that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee nation."

We may pause for a moment here to analyze the results of this agreement. The occupancy and right of occupancy of the lands sold, together with the buildings which might be attached to the freehold, *i. e.*, all "improvements," as they are popularly termed, were to be the individual property of the purchasers; the estate in the land was to remain communal and continue subject to the constitution and laws of the Cherokees; in case of a future allotment of lands within the Cherokee nation, these were to be allotted exclusively to the Delawares.

It seems plain to the court that this part of the agreement is for the sale of a specific thing for a specific price. It indeed merely fixes the rate per acre at which land may be purchased, and leaves the Delawares free (within certain restrictions) to take as much or as little as they needed. If they took 50,000 acres they would pay $50,000; if they took 51,000 acres they were to pay $51,000. As a matter of fact, they took 157,600 acres, and paid $157,600. The money was the consideration named for the land, and the land the

consideration named for the money. The Cherokees as grantors conveyed no right or interest other than the lands sold, and the Delawares as grantees acquired no right or interest in lands other than those for which they paid. As to the communal element of the estate conveyed, considered in the abstract, it is manifest that while the lands granted remained communal they were not owned in common by the Cherokees.

The right of occupancy and the remote right to the fee were both vested in the Delawares. The agreement expressly excluded the Cherokees from any right of property in the lands of the Delawares, and by implication (in the absence of a provision to the contrary) excluded the Delawares from any right of property in the lands of the Cherokees. After it was executed and its covenants performed, there would be two communities in the Cherokee country, and each in the matter of property, so far as the agreement was involved, would be independent of the other; but the property rights
45 of both would be subject to the constitution of the Cherokee nation, and (within constitutional limitations) to the laws of the Cherokee government.

The facts and circumstances attendant on the transaction, and which were known to the contracting parties when they entered into the agreement, sustain the construction that the court is constrained to give to it. They have been set forth with vigor and clearness in the communication from the delegates of the Cherokee nation to the Committee on Indian Affairs of the Senate, before cited, from which we extract the following paragraph:

As has been seen, the Delawares purchased 157,600 acres of Cherokee lands, lying east of the 96th degree. That was an absolute and unconditional purchase, and in which lands the Cherokee nation has no title or interest. Again, the fund of the Cherokee nation in which the Delawares were to share was fixed at $1,678,000.

It is estimated, taking $1.25 per acre for the land, as a basis of valuation, that the wealth of the Cherokee nation at the date of the agreement was:

"Strip" lands, ceded by the 17th article of the treaty of 1866, over 400,000 acres	$500,000
"Neutral" lands, ceded by same article	1,000,000
Lands lying west of the 96th degree, about 8,000,000 acres	10,000,000
Land east of the 96th degree, about 5,000,000 acres	6,250,009
National fund	678,000
Making a total of	$18,428,000

At the same time the population of the Cherokee nation was about 13,000, making a *per capita* wealth of $1,416. By adding to the national wealth of the Cherokees the amount received from the Delawares and the Shawnees, we find a total of $18,757,424, and by adding the population of these two tribes to that of the Cherokees the number will be found to be 14,757, and a division will show a

per capita wealth of something over $1,200. Now, it seems absurd to say that the Cherokee people were willing and so ignorant as to diminish their *per capita* wealth from $1,400 to $1,200, and give to the Delawares a *per capita* wealth of $1,200 for $123.00, and to the Shawnees a like *per capita* wealth for the sum of $19.00, and at the same time permit these two tribes to share in the funds which they paid as a consideration for the rights and privileges with the Cherokees. We submit that no such inequality and injustice was ever intended. If such was the intention, why was not the value of the Cherokee "strip" lands in Kansas, which were being disposed of for the benefit of the Cherokees at the same time and under the same article of the treaty that the neutral lands were being disposed of, and also the Cherokee "outlet" lands, added to the Cherokee national fund as a basis for calculating the amount to be paid to the Cherokees by these people?

This statement must not be taken without some modification. There were, indeed, at the time two tracts of land, the Cherokee strip and the neutral lands, which the United States were to survey and sell to their own citizens for the benefit of the Cherokees. What was to be done with the proceeds of the Cherokee strip was not a subject of stipulation between the Cherokees and Delawares. It may have been understood or expected that they would be paid into the treasury of the nation and used or held for governmental purposes, and not distributed to or funded for the benefit of the Cherokees as communal owners. Such, indeed, was the fact.

Out of a total of $523,873, which was derived from the sales of lands in the Cherokee strip, $25,000 was appropriated to an asylum and $401,559 was used for general governmental purposes, and none was set aside for the exclusive benefit of the communal owners, the Cherokees. The "neutral lands," whose avails were to augment the national fund, were estimated in the agreement as of the value of $1,000,000, and the Delawares paid in their proportion upon that basis, although the avails might not augment the fund for
46 several years, and the treaty authorized a sale in mass for $800,000. Sales were contemplated by the treaty, 1866 (article 16), in the great body of land lying west of the 96th degree, commonly known as the "Cherokee outlet," but these sales were restricted to "friendly Indians," "not exceeding 160 acres for each member of each of said tribes thus to be settled," and the value of the mass of 8,000,000 acres in 1866 could not well have been as much as $10,000,000.

The statement, in a word, is a clear and forcible presentation of the facts from the present Cherokee point of view. Nevertheless, after all due allowances have been made, it is apparent that the Delawares retained their separate national fund of $889,191 in the Treasury of the United States as their separate property; and that the property of the Cherokees vastly exceeded that which they contributed to the communal estate and the consideration which they paid for a foothold in the Cherokee country. Moreover, as citizens of the nation they have had the benefit of the moneys derived from

the Cherokee strip, and the national fund has been augmented and augmented until it now amounts $2,636,634, and to this augmentation the Delawares as Delawares have contributed nothing.

But there is another part of this controversy which has caused more doubt and which now brings the court to a different conclusion.

The agreement of 1867, which we have been considering as a mere contract, was something more than a deed of bargain and sale, viz., a treaty. After being executed by the delegates of the nation it was "ratified by the national committee, June 15, 1867," (Laws of the Cherokee Nation, p. 281.) By this treaty two independent bodies politic united and became one, the lesser, according to its terms, being merged in the greater. The compact regulated and guaranteed the individual and political rights of those who surrendered their independent corporate existence and became members of the Cherokee nationality. It assured them of something more than mere residence and rights of property upon Cherokee territory, viz., that upon their enrollment and compliance with the conditions and stipulations of the agreement "all of the members of the tribe, registered as above provided, shall become members of the Cherokee nation, with the same rights and immunities" "as native Cherokees."

What, then, were these "rights and immunities" which the Delawares acquired by becoming "members of the Cherokee nation"?

The constitution, in its first article (before quoted) uses the term "citizens," and a subsequent provision prescribes and declares who the citizens of the nation shall be:

SEC. 5. No person shall be eligible to a seat in the national council but a free Cherokee male citizen, who shall have attained to the age of twenty-five years.

The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this nation, shall be entitled to all the rights and privileges of this nation as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or the mother's side, shall be eligible to hold any office of profit, honor, or trust under this government.

At that time, therefore, the right of citizenship was strictly limited to native Cherokees of Cherokee descent. By the amendments of 1866 the requirements of citizenship were changed:

SEC. 5. No person shall be eligible to a seat in the national council but a male citizen of the Cherokee nation, who shall have attained to the age of twenty-five years, and who shall have been a *bona fide* resident of the district in which he may be elected, at least six months immediately preceding such election. All
47 native-born Cherokees, all Indians, and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the com-

mencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee nation, shall be taken and deemed to be citizens of the Cherokee nation.

Therefore the Delawares, according to the express terms of the treaty of union, that is to say, the agreement of 1867, became "members of the Cherokee nation with the same rights and immunities as native Cherokees;" and according to the then existing constitution, the amendment of Nov. 29, 1866, "all Indians" "legally members of the nation by adoption" are classed with "native-born Cherokees" and shall be "taken, and deemed to be, citizens of the Cherokee nation." The Delawares were Indians; they became "legally members of the nation by adoption;" they must be "taken and deemed to be citizens" identical in all constitutional rights with "native-born Cherokees."

The resulting question, therefore, which is thus brought before the court for determination is, what were these constitutional "rights and privileges" of the Delawares as adopted citizens of the Cherokee nation?

Herbert Spencer has said, "Did primitive communal ownership survive, there would survive the primitive control of the uses to be made of land." (The Man *versus* The State, p. 386, ed. 1892.) In the Cherokee country the converse of this is the condition of affairs. "The primitive control of the uses to be made of land" has passed from the communal owners and become lodged in the State—that is to say, in the government of the nation—and the communal owners as such exercise no more control over the national territory than the citizens of the United States exercise over the public lands of the United States. Of this the statutes of the Cherokees afford overwhelming evidence.

The constitution, as before quoted, recognizes a right of occupancy under the name of "improvements" as "an exclusive and indefeasible property" in citizens rightfully in possession, but at the same time expressly vests in the national council "power to adopt such laws and regulations as its wisdom may deem expedient and proper to prevent citizens from monopolizing improvements (*i. e.*, occupancy) with the view of speculation." A statute contemporaneous with the constitution is entitled "An act regulating settlements on the public domain." (Act Sept. 24, 1839, Laws of the Cherokee Nation, ed. 1875, p. 249.) A statute for the preservation of trees refers to trees "standing and growing upon the public domain" (*id.*, p. 143, § 67). The act 14th December, 1870 (*id.*, p. 252), declares the conditions upon which railroad ties and other material shall "be furnished from the public domain." The act 17th December, 1869 (*id.*, p. 255), is entitled "An act for the protection of the public domain," and the act 14th December, 1870 (*id.*, p. 257), "An act in relation to the public domain."

All of these statutes and many others justify by their provisions the use of the term, "public domain." A statute relating to minerals declares that "All gold, silver, lead, copper, iron, stone coal,

petroleum, salt, or medicinal water" which has been or may be discovered within the limits of the country "is the property of the Cherokee nation," and provides for the leasing of mines, petroleum beds, salt works, and of mineral springs (*id.*, 226). The act regulating settlements on the public domain declares
48 that if they be left unoccupied they shall "revert to the nation as common property" (*id.*, p. 249). The statute for the preservation of trees makes it a misdemeanor to cut down, kill, or destroy any fruit or nut bearing tree "standing and growing upon the public domain of the Cherokee nation" (*id.*, p. 143). The act relating to railroad ties imposes a royalty to be paid for taking timber from the public domain or stone from the quarries of the nation (*id.*, p. 252). The act for the protection of the public domain requires a citizen to take out a license before he can dispose of sawed lumber, and to pay into the treasury fifteen per cent. of the money he receives for it (*id.*, p. 255). The act in relation to the public domain provides that at each and every station along the line of any railroad passing through "the lands of the Cherokee nation there shall be reserved to the Cherokee nation one mile square," and that these tracts so reserved "shall be laid off into town lots and sold at public sale to the highest bidder," who shall acquire thereby no other rights "than those of use and occupancy," "provided that this act shall not be so construed as to interfere with any of the mineral resources of the public domain" (*id.*, p. 57). The act for the support and education of orphan children empowers the trustees "to occupy and hold as much land, not exceeding two miles square, as they may deem necessary for farming and mechanical purposes" (*id.*, p. 258). The act authorizing the transfer or sale of Cherokee lands west of the Arkansas authorizes the sale of "all the Cherokee lands," "commonly known as the Cherokee outlet." The act 19th May, 1883, recognizes "the unoccupied lands belonging to the Cherokee nation" as having been set apart by a previous statute "to produce revenue from grazing," and authorizes and directs the principal chief "to execute a lease for all the unoccupied lands of the Cherokee nation" west of the Arkansas. And other statutes and treaties have recognized and exercised the power of absolute sale and alienation without authority from or ratification by communal owners.

With this power of regulation and control of the public domain and the *jus disponendi* lodged in the government of the nation, it is plain that the communal element has been reduced to a minimum and exists only in the occupied lands. And it is manifest that with the growth of civilization, with all of its intricacies, and manifold requirements, the communal management of the public domain would have been utterly insufficient, and if it had continued would have been a barrier to the advancement of civilization itself.

With these powers of absolute ownership lodged in the Cherokee government, the power to alienate, the power to lease, the power to grant rights of occupancy, the power to restrict rights of occupancy, and with the exercise of those powers running back to the very year of the adoption of the constitution, and receiving from that time to

the present the unquestioning acquiescence of the former communal owners, the Cherokee people, it is apparent that the "public domain" of the Cherokee nation is analogous to the "public lands" of the United States or the "demesne lands of the Crown," and that it is held absolutely by the Cherokee government, as all public property is held, a trust for governmental purposes and to promote the general welfare.

A strong argument in favor of the Cherokee nation undoubtedly might be made upon the assumption that so long as the public domain is held and used for public purposes it must be held
49 and used for the benefit of all citizens, but that whenever it shall cease to be held as public property and be surrendered to its communal owners it must be restored to those from whom it was taken, to those who were in fact and not constructively the owners, and who in equity and right are entitled to it or to its proceeds; just as land which is no longer used for a public road is not sold for the benefit of the community, but reverts to the specific owners from whom it was taken for public uses; and that the means and methods for making the distribution and the ascertainment of the former or actual parties entitled to the fund are matters necessarily and properly within the legislative discretion of the national council. To these propositions there are in the opinion of the court two answers:

First. The constitution declares that "the lands of the Cherokee nation shall remain common property." The context shows that this brief provision was intended to place two restrictions upon the legislative power: First, the fee in the lands of the Cherokee was not to be given away to individuals and corporations as the lands of the United States have been given; second, the holding of the fee by the Cherokee government was not absolute but as "common property." By the term "common property" was undoubtedly intended that the lands should be held for the general welfare of all persons entitled to share in the "rights and privileges" declared and established by the constitution—that is to say, of all Cherokee citizens.

The constitution was not a statute to run for a day or a year, but a supreme law which was to continue, with occasional modifications, and regulate and assure the civil and political and personal rights of Cherokee citizens for all time. The persons who were equally entitled to its benefits in 1839 were the citizens of the Cherokee nation then in being; and the persons who were entitled to its benefits in 1883 or in 1890 were the citizens of the Cherokee nation then in being. A common property in the lands of the Cherokee nation was one of those rights and privileges, and being such could not be divested or extinguished by the legislative power.

Second. The treaty or agreement with the Delawares of 1867 provides that "the children hereafter born of such Delawares so incorporated into the Cherokee nation shall in all respects be regarded as native Cherokees." The amendment to the constitution of 1866 classifies all citizens as (1) "native-born Cherokees," (2) Indians by adoption, (3) whites by adoption, (4) freedmen liberated by the

voluntary act of their owners or by law, and (5) free colored persons. When the agreement declared that all children born after the Delawares became citizens of the Cherokee nation should "be regarded as native Cherokees" it placed them with the "native-born Cherokees" of the amendment—that is to say, it declared that they should be regarded as children of Cherokee blood. Since this agreement was entered into more than a quarter of a century has passed away, and it must be assumed that nearly half of the citizens of the Cherokee nation have been born during this period. As against these who are of Delaware parentage no possible discrimination can be made either under the constitution or under the agreement.

We have spoken of the Cherokees as possessed of a superior equity in this money in their character of communal owners to the Delawares. But, in fact, no such equity exists. The Cherokees are selling the heritage of their fathers and the patrimony of their children, and dividing the money among the present generations—that is, among themselves—instead of funding it as a part of their national resources for the welfare of those who are to come after them; and this despite the obligation which rests upon generations and individuals to transmit to their posterity as much as they have inherited from their ancestors.

The Delawares when they entered into the agreement had no right to expect that the lands of the Cherokees would be sold and that they would be admitted to share in the proceeds by virtue of either their purchase or their citizenship. They cannot now say that they were induced to enter into the agreement on the faith of any such expectation. But they had a right to expect that that which the laws of the Cherokees defined as "the public domain" would continue to be held and used for national purposes and the general welfare; and they certainly could not have anticipated or been bound to anticipate that the public domain of the nation would be diverted from public to private uses and its proceeds be divided among a portion of the people to the exclusion of themselves.

Moreover, it is equally apparent that no such expectation existed on the part of the Cherokees. They guarded their national fund and provided for its enlargement and for the disposition to be made of the money to be derived from the sale of the neutral lands; and they required the Delawares to contribute to the national fund on the basis of this augmentation; and they admitted them to become "members of the Cherokee nation with the same rights and immunities and the same participation in the national funds as native Cherokees;" and they agreed that "children hereafter born of such Delawares shall, in all respects, be regarded as native Cherokees," and yet they did not, by one line or one sentence, reserve to themselves an exclusive right in the public domain, or provide for the contingency of a sale of more than half of their then national territory.

The present condition of affairs is not a *casus amissus*, but an afterthought—a new element which did not exist when the agreement was made; a new condition of affairs which has been created since

by the act of one of the parties. It is true that if the public domain or its proceeds had been wholly reserved for public purposes, the Delawares would participate as citizens in many benefits—in immense benefits for which they did not pay; but their case would be like that of all immigrants coming into all civilized countries. who reap where they have not sown, and acquire a common interest in the common property without the payment of an equivalent in money.

The constitution of the Cherokees was a wonderful adaptation to the circumstances and conditions of the time, and to a civilization that was yet to come. It was framed and adopted by a people some of whom were still in the savage state, and the better portion of whom had just entered upon that stage of civilization which is characterized by industrial pursuits; and it was framed during a period of extraordinary turmoil and civil discord, when the greater part of the Cherokee people had just been driven by military force from their mountains and valleys in Georgia, and been brought by enforced immigration into the country of the Western Cherokees; when a condition of anarchy and civil war reigned in the territory—a condition which was to continue until the two branches of the nation should be united under the treaty of 1846 (27 C. Cls. R., 1):

> yet for more than half a century it has met the requirements
> 51 of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are

concerned, no material alteration or amendment, and deserves to be classified among the few great works of intelligent statesmanship which outlive their own time and continue through succeeding generations to assure the rights and guide the destinies of men. And it is not the least of the successes of the constitution of the Cherokees that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it for the protection of Cherokee citizens and the maintenance of their personal and political rights.

Resting its conclusion upon the constitution, the court is of the opinion that all citizens of the Cherokee nation must be regarded in the administration of their constitutional rights, civil, political, and personal, as Cherokees; that the national council is in effect prohibited by the constitution from making discriminations concerning the common property of the nation between different classes of citizens, and is without power, in the administration of its trust, to perceive differences which exist only in race or blood; that so much of the acts 18th May, 1883, and 25th November, 1890, as restricts the payment of funds which were derived from the public domain, to "citizens of the Cherokee nation by blood," is unconstitutional and void; and that the plaintiffs in this suit are entitled to participate in those funds as if no such restriction had been enacted.

In view of the fact that this case is in legal effect a suit in equity which may be followed by a decree for specific performance, by injunction or other equitable remedy; and that the evidence consists entirely of statutes, treaties, and public documents involving con-

struction, the court will not file a finding of facts; but the agreed statement of facts, and such other evidence as may be desired by any party will be certified to the Supreme Court.

The court will hear counsel as to the form of the decree to be entered in accordance with this decision; and in the meantime the entry of judgment will be suspended.

52 X.—*Decree of the Court, Filed May* 22, 1893.

CHARLES JOURNEYCAKE, Principal Chief of the Delaware Indians, Complainant,
vs.
THE CHEROKEE NATION and THE UNITED STATES, Respondents. } No. 16837.

This cause coming on to be heard upon the petition, answers, agreed facts, proofs, and arguments submitted by the parties respectively, and the court having heard the same, and considered the just rights in law and equity of the Delaware Indians who are settled and incorporated into the Cherokee nation, in pursuance of the authority vested in the court by the act of Congress entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians, and the freedmen of the Cherokee nation, and for other purposes," approved October 1, 1890:

And it appearing to the court that under the provision of article 15 of the treaty of July 19, 1866 (14 Stat. L., p. 799), and the agreement made by and between the Cherokee nation and the Delaware Indians, dated the 8th day of April, 1867, approved by the President the 11th day of the same month, the said Delaware Indians were admitted into and became a part of the Cherokee nation entitled to equal rights and immunities and to participation in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood;

It is ordered, adjudged, and decreed that so much of the acts of the Cherokee national council of May 18, 1883, and of November 25, 1890, as restricts the distribution of funds which were derived from the public domain to citizens of the nation by blood be held and deemed contrary to and in derogation of the constitution of the Cherokee nation, and that the said Cherokee nation, or its trustees, the United States, account for, render, and pay to the said Delawares out of any funds of the said nation in its national treasury, or in the custody of the United States as trustees, not specifically appropriated by law to other purposes, or out of fund that may hereafter come to the possession of said trustees belonging to the Cherokee nation, a sum equal to the aggregate amount which the Delawares would have received if the before-mentioned unconstitutional restrictions in said statutes had not existed.

And it is further adjudged and decreed that the claimants in this suit and those whom they represent, being citizens of the Cherokee nation of Delaware blood or parentage, be adjudged and de-

creed to be entitled to participate hereafter in the common property of the Cherokee nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution *per capita* at any time hereafter, the defendants The Cherokee Nation and the defendants The United States as trus-
53 tees of the Cherokee nation be enjoined and prohibited from making any discrimination between Cherokee citizens of Cherokee blood or parentage and Cherokee citizens of Delaware blood or parentage to the injury or prejudice of the latter.

And it is further adjudged and decreed as to the participation of the Delawares in the two funds referred to in the two statutes of the Cherokee nation hereinbefore declared to be unconstitutional, which sums amount in the aggregate to $600,000, that such distribution shall be based on the agreed census of the native and adopted citizens as ascertained and agreed upon, to wit, 26,771, being taken as the whole number of Cherokee citizens of all descriptions, and the said Delawares being taken as 759 of said whole number, and that the fund so ascertained, to wit, the sum of $17,011, be paid by the treasurer of the Cherokee nation or by the Secretary of the Interior of the United States to the individual Delawares, *per capita*, who would have been entitled to the same if the unconstitutional restrictions and discriminations in said statutes had not existed.

And it is further ordered, adjudged, and decreed that the respondent, The Cherokee Nation, pay the costs of this suit.

And it is further ordered, adjudged, and decreed that the compensation to be paid to the attorney and solicitor of the complainants in this cause be 10 per centum of the amount that the said complainants shall receive under this decree, which compensation is hereby ordered to be paid upon the adjustment and receipt of the amounts as ascertained and paid over or set apart to said Delawares, to wit, 10 per centum of $17,011, being $1,701.10. And that if any further recovery be had under this decree, the right of the claimant's attorney to further costs and allowances be reserved to be hereafter determined and fixed by the court.

And it is further ordered and decreed that if the judgment hereinbefore declared be not carried out and satisfied within six months from the time a copy of this decree shall have been served on and delivered to the principal chief of the Cherokees and the Secretary of the Interior of the United States, the claimants may apply to the court for such further order, relief, or remedy as may be meet.

BY THE COURT.

54 XI.—*Application of Defendants for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the 22d of May, 1893, in favor of the claimant, the defendants The United States, by their Attorney General, and by Maxwell and Chase for the Cherokee Nation, on the 22d day of June, 1893, make

application for and give notice of an appeal to the Supreme Court of the United States.

MAXWELL AND CHASE,
For the Cherokee Nation.

JOHN C. CHANEY,
For the United States.

Filed June 22, 1893.

Allowed by the court December 4, 1893.

WILLIAM A. RICHARDSON,
Chief Justice.

55 In the Court of Claims.

CHARLES JOURNEYCAKE, Principal Chief of the Delaware Indians,
vs.
THE CHEROKEE NATION and THE UNITED STATES. } No. 16837.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the agreed facts and evidence on which the case was submitted, of the opinion and decree of the court, of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims, at Washington city, this 29 day of December, A. D. 1893.

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: Case No. 15,476. Court of Claims. Term No., 619. The United States and The Cherokee Nation, appellants, *vs.* Charles Journeycake, principal chief of the Delaware Indians. Filed January 3rd, 1894.

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FILED
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES AND THE CHEROKEE NATION, appellants,
v.
CHARLES JOURNEYCAKE, PRINCIPAL chief of the Delaware Indians.
} No. 619.

BRIEF FOR THE GOVERNMENT.

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES AND THE CHEROKEE Nation, appellants,
v.
CHARLES JOURNEYCAKE, PRINCIPAL chief of the Delaware Indians.
No. 619.

BRIEF FOR THE GOVERNMENT.

This was a suit brought by the appellees against the Cherokee Nation, joining the United States as a defendant to establish the rights of certain adopted citizens in the tribal funds of that nation by virtue of the treaty of adoption, jurisdiction wherein was entertained by the Court of Claims in pursuance of two acts of Congress, one approved October 1, 1890, entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," the other approved July 6, 1892, and entitled "An act supplementary and amendatory to an act entitled 'An act to refer to the Court of

Claims certain claims of the Shawnee and Delaware Indians and freedmen of the Cherokee Nation, and for other purposes,' approved October first, eighteen hundred and ninety."

The Cherokee Nation preferred to retain and be represented by counsel of their own selection, namely, Messrs. Maxwell and Chase, who have conducted the defense of the action, and whom the Attorney-General has therefore deemed wise to leave in full charge of that defense.

In this case the Government of the United States, if interested at all, is interested only as a stakeholder, for the reason that the funds in its hands may be made the source from which is drawn any payment decreed to the claimants. The Government has sought not to embarrass or inconvenience either party in the conduct of the litigation or the presentation of their rights, and joined in the appeal to this court at the request and in concert with the attorneys for the Cherokee Nation, in order that all questions properly raised by the record might be considered here.

It is therefore urged, on behalf of the Government, that no judgment entered herein should be a charge against the United States, and that no costs should be imposed upon the public Treasury.

Respectfully submitted.

J. E. Dodge,
Assistant Attorney-General.

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IN THE

SUPREME COURT OF THE UNITED STATES.

THE CHEROKEE NATION AND THE UNITED STATES,
Appellants.

vs.

CHARLES JOURNEYCAKE,
Principal Chief of the Delaware Indians,
Appellee.

No. 619

Statement of the Case.

On October 1, 1890, an act of Congress was approved by the President, which contained, among others, the following provisions:

"SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation, out of any money or funds which have, or may be paid into the treasury of, or in any way have come, or may come, into the posses-

sion of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degree west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee Council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement."

Under authority of this act the suit at bar was brought by the Delaware Indians residing with the Cherokees, nominally to recover from the Cherokee Nation a ratable proportion of the proceeds of certain grazing leases on lands lying west of the 96th degree in the Indian Territory, which proceeds the Cherokees are charged with having appropriated to themselves (Cherokees by blood), in violation of the agreement between the Cherokees and Delawares of April 8, 1867, under which the said Delawares became incorporated with the Cherokees, which agreement was in turn made under authority of the fifteenth article of the treaty of July 19, 1866, between the United States and the Cherokee Nation.

Thus it will be seen that while this suit, upon its face, involves only the distribution of some five hundred and odd thousand dollars of lease money, there lies behind it the question of title to the land itself, as upon the interest of the Delawares *in the soil* depends their right to participate in the proceeds of the grazing leases. These lands have, since the commencement of this suit, been sold to the United States for the sum of $8,595,736.12, of which the sum of $1,660,000.00 is retained subject to the result thereof.

The entire question hinges upon the interpretation to be given to a phrase in the contract between the Cherokees and Delawares, as follows:

"On the fulfilment by the Delawares of the foregoing stipulations all the members of the tribe registered, as above provided, shall become members of the Cherokee Nation with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

"And the children hereafter born of such Delawares, so incorporated into the Cherokee Nation, shall in all respects be regarded as natives Cherokees."

The question being, did the "rights and immunities" and "national funds," here mentioned, refer to civil and political rights, and to the national fund, as it then existed, or did these expressions include the whole Cherokee possessions, as well that part upon which said contract was silent, as those parts to which is specifically referred and specifically described.

At the time the agreement mentioned was entered into, the Cherokee Nation was possessed
ing tracts or bodies of land:

"Strip" lands in Kansas (about) . .
"Neutral" lands in Kansas (about) . .
Lands west of 96° Indian Territory (about)
Lands east of 96° Indian Territory (Ho
Reservation), about . . . . . .

The question presented for the determination of the court is whether the Delaware Indians are entitled, by virtue of the provisions of the fifteenth article of the treaty of July 19, 1866, between the United States and the Cherokee Nation (14 Stat., 803), and the agreement entered into on the 8th day of April, 1867, between the Cherokee Nation and the Delawares, to a ratable interest in all these lands and the proceeds thereof, or only to such parts as are particularly mentioned and specified in said agreement.

sion of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degree west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee Council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement."

Under authority of this act the suit at bar was brought by the Delaware Indians residing with the Cherokees, nominally to recover from the Cherokee Nation a ratable proportion of the proceeds of certain grazing leases on lands lying west of the 96th degree in the Indian Territory, which proceeds the Cherokees are charged with having appropriated to themselves (Cherokees by blood), in violation of the agreement between the Cherokees and Delawares of April 8, 1867, under which the said Delawares became incorporated with the Cherokees, which agreement was in turn made under authority of the fifteenth article of the treaty of July 19, 1866, between the United States and the Cherokee Nation.

Thus it will be seen that while this suit, upon its face, involves only the distribution of some five hundred and odd thousand dollars of lease money, there lies behind it the question of title to the land itself, as upon the interest of the Delawares *in the soil* depends their right to participate in the proceeds of the grazing leases. These lands have, since the commencement of this suit, been sold to the United States for the sum of $8,595,736.12, of which the sum of $1,660,000.00 is retained subject to the result thereof.

The entire question hinges upon the interpretation to be given to a phrase in the contract between the Cherokees and Delawares, as follows:

"On the fulfilment by the Delawares of the foregoing stipulations all the members of the tribe registered, as above provided, shall become members of the Cherokee Nation with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

"And the children hereafter born of such Delawares, so incorporated into the Cherokee Nation, shall in all respects be regarded as natives Cherokees."

The question being, did the "rights and immunities" and "national funds," here mentioned, refer to civil and political rights, and to the national fund, as it then existed, or did these expressions include the whole Cherokee possessions, as well that part upon which said contract was silent, as those parts to which is specifically referred and specifically described.

At the time the agreement mentioned was entered into, the Cherokee Nation was possessed of the following tracts or bodies of land:

	Acres.
"Strip" lands in Kansas (about)	400,000
"Neutral" lands in Kansas (about) . . .	1,000,000
Lands west of 96° Indian Territory (about) .	8,000,000
Lands east of 96° Indian Territory (Home Reservation), about	5,000,000

The question presented for the determination of the court is whether the Delaware Indians are entitled, by virtue of the provisions of the fifteenth article of the treaty of July 19, 1866, between the United States and the Cherokee Nation (14 Stat., 803), and the agreement entered into on the 8th day of April, 1867, between the Cherokee Nation and the Delawares, to a ratable interest in all these lands and the proceeds thereof, or only to such parts as are particularly mentioned and specified in said agreement.

This determination involves the consideration of article four of the treaty of 1866 between the Delaware Indians and the United States (14 Stat., 794), the fifteenth article of the treaty of 1866 between the Cherokee Nation and the United States (*Id.*, 803), and the agreement between the Cherokee Nation and the Delawares of April 8, 1867.

Briefly stated, the judgment below holds that under the terms of said agreement the Delaware Indians became joint owners with the Cherokees in all the common property of the latter, wherever situated, and hence are entitled to share in all profits and benefits arising from or on account of any such property, whether described in said agreement or not.

The contention of appellants, on the other hand, is that by said agreement a certain specific and limited quantity of land was sold to said Delawares, and that for a certain other sum they were admitted to citizenship in the Cherokee Nation with equal political and civil rights, but acquired no property rights beyond those particularly mentioned and declared in said instrument, and hence they are not entitled to share in any profits arising from lands not so particularly mentioned in said agreement, and that they are entitled to no part or share in the proceeds of leases of lands lying west of the ninety-sixty degree, as those lands were not mentioned in said agreement.

For more ready reference we reprint the two articles and contract in the order of execution.

The fourth article of the Delaware treaty, by which they ceded their Kansas lands, is as follows (July 4, 1866):

"The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian

country, to be selected by the Delawares in one body, in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, *a quantity equal to one hundred and sixty* (160) *acres for each man, woman, and child* who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of land in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States, and also surveyed as public lands are surveyed, when the Delaware Council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior."

The fifteenth article of the Cherokee treaty (corresponding to the amnesty treaties with the several five civilized tribes made at about the same time) is as follows (July 19, 1866):

"ARTICLE 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, *on unoccupied lands east of* 96°, on such terms as may be agreed upon by any such tribe, and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organizations, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to *preserve* their tribal organizations, and to maintain their tribal laws, customs and usages, not inconsistent with the constitution and

laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in case of disagreement the price to be fixed by the President.

"And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians, who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee National Council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude."

The agreement between the Cherokees and Delawares, is as follows (April 8, 1867):

"Whereas, by the fifteenth article of a certain treaty between the United States and the Cherokee Nation, ratified August 11, 1866, certain terms were provided, under which friendly Indians might be settled upon unoccupied lands in the Cherokee country east of the line of the 96° of west longitude, the price to be paid for such lands to be agreed on by the Indians to be thus

located and the Cherokee Nation, subject to the approval of the President of the United States; and whereas, by a treaty between the United States and the Delaware tribe of Indians, ratified August 10, 1866, the removal of the said Delawares to the Indian country south of Kansas was provided for; and, in the fourth article whereof, an agreement was made by the United States to sell to the Delawares a tract of land, being part of a tract the cession of which by the Cherokees to the United States was then contemplated; and whereas, no such cession of land was made by the Cherokees, to the United States, but, in lieu thereof, terms were provided, as hereinbefore mentioned, under which friendly Indians might be settled upon their lands; and whereas, a full and free conference has been had between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee Nation.

"Now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

"The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfilment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to one hundred and sixty acres for each individual of the Delaware tribe, who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elect to remove to the 'Indian country,' to which list may be added, only with the consent of the Delaware Council, the names of such other Delawares as may, within one month after the signing of this agreement, desire to be added thereto, and the selection of the lands to be purchased by the Delawares may be made by said Delawares in any part of the Cherokee Reservation east of said line of 96° not already selected and in possession of other parties, and in case the Cherokee lands shall

hereafter be allotted among the members of said nation, it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivision when surveys are made—*that is to say, one hundred and sixty acres for each individual—shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation*, nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with, in any manner whatever, without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon native citizens thereof.

"Provided, that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee Nation.

"And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees, from the Delaware fund now held or hereafter received by the United States a sum of money equal to one dollar per acre for the whole amount of one hundred and sixty acres of land for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto heretofore provided for.

"And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares to procure funds necessary to pay for said land; but in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation at their market value at the date of such transfer.

"And the said Delawares further agree that there shall be paid from their funds now or hereafter to come into possession of the United States, a sum of money which shall sustain the same proportion to the existing Cherokee national fund, that the number of Delawares registered as above mentioned and removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee Nation. And for the purpose

of ascertaining such relative numbers, the registers of the Delawares herein referred to with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculations as to the Delawares, and an accurate census of the Cherokees residing in the Cherokee Nation shall be taken under the laws of that nation within four months, and properly certified copies thereof filed in the Office of Indian Affairs, which shall be the basis of calculations as to the Cherokees.

"*And that there may be no doubt hereafter as to the amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000.*

"And the Delawares further agree, that in calculating the total amount of said national fund, there shall be added to the said sum of $678,000 the sum of $1,000,000, being the estimated value of *the Cherokee neutral lands in Kansas*, thus making the whole Cherokee national fund $1,678,000; and this last-mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund.

"Provided, that as the $678,000 of funds now on hand belonging to the Cherokees is chiefly composed of stocks of different values, the Secretary of the Interior may transfer from the Delawares to the Cherokees a proper proportion of the stocks now owned by the Delawares of like grade and value, which transfer shall be in part of the pro rata contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the pro rata contribution by the Delawares to said fund shall be in cash or United States bonds, at their market value.

"All cash and all proceeds of stocks, whenever the same may fall due or be sold, received by Cherokees from the Delawares under the agreement, shall be invested and applied in accordance with the twenty-third article of the treaty with the Cherokees of August 11, 1894.

"On the fufilment by the Delawares of the foregoing stipulations all the members of the tribe registered, as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees, save as hereinbefore provided.

"And the children hereafter born of such Delawares, so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees."

Argument.

While the language to be interpreted is brief and apparently simple, there is such a gross and unconscionable inadequacy of consideration for the benefits claimed by the appellees and confirmed by the decision of the court below that that fact alone would challange an inquiry into the circumstances leading up to the making of the contract.

The objections to the contention of appellees and the judgment below seem to arrange themselves under three propositions: first, the purpose sought to be subserved by the treaties and agreement, as manifested in the circumstances surrounding and leading up to them; second, the plain intendment of the contract, as appears from its terms; third, the gross inadequacy of consideration for the benefits claimed.

First then as to—

The History Surrounding and Leading up to the Treaties and Agreement in Question.

This inquiry, we apprehend, will be considered pertinent and proper. In the recent case of Smith *vs.* Townsend, in this court, in which the writers of this brief had the honor to appear for the appellee, the court say:

"It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy." (148 U. S., 494.)

It will be remembered that in the five civilized tribes of the Indian Territory slavery existed, prior to the war, as it did in the Southern States. This territory was a border land between the North and South, and became

the theater of important military operations. A part of these people allied themselves with the Southern cause, while many joined the armies of the North.

The time when the treaties and agreement under consideration were entered into (1866-'67) was immediately after the close of the war, when the interest and attention of Congress was absorbed in questions of reconstruction and reorganization. The bondsmen of the Cherokees had been emancipated as the bondsmen throughout the Southern States had been. The property of the Cherokees who had joined the Southern cause had been extensively confiscated, and there was a widespread condition of insecurity, uncertainty, and doubt. With this condition of affairs in view, an adjustment of the civil and political establishments of the five civilized tribes was contemplated, on the same general lines as the Southern States were being reconstructed, and with the same objects, and no other, in view. To this end, during the year 1866, treaties were negotiated with each of these tribes. In all these, amnesty provisions were incorporated, and provisions looking to the security of civil and political rights in the various contending factions throughout this Territory on the lines contemplated in the fourteenth and fifteenth amendments to the constitution of the United States, and the various acts of Congress in relation thereto. To more perfectly insure the success of this plan there was also incorporated in each of these several treaties a provision whereby it was agreed on the part of the tribes that:

"A council consisting of delegates elected by each nation or tribe, lawfully resident within the Indian Territory, may be annually convened in the said Territory, to be organized as follows," etc., etc.

Following this were provisions providing in detail for the organization and maintenance of a general legislative

body, with delegates from each of the several tribes, which should secure to all the inhabitants of said Territory protection of person and property, and the enjoyment of equal political and civil rights. (See treaties with the several tribes, 14 Stat.)

While this plan never became wholly effective by being put into operation, each of the various treaties referred to was made in the same spirit and with the same general object in view. Upon the arrival of the Commissioners of the United States at Fort Smith, Ark., for the purpose of negotiating the treaties above referred to, including the Cherokee treaty under consideration in this case, the representatives of the various tribes assembled were informed that the Commissioners were authorized and empowered to enter into treaties with them upon the basis of certain conditions, among which especially that—

"Each tribe must enter into a treaty for permanent peace and amity with themselves, each nation and tribe, and with the United States."

Following this were provisions for the abolition of slavery and the prohibition of involuntary servitude, save as a punishment for crime, etc. (See Ind. Office Rep., 1865, p. 34, *et seq.*)

This commission, consisting of D. N. Cooley, Hon. Elijah Sells, Thos. Weston, a leading member of the Society of Friends, Gen. W. S. Harney, and Col. E. S. Parker, of Gen. Grant's staff, was sent to these civilized tribes to negotiate general propositions upon which uniform treaties might be based, the central idea of which was *political organization, equal civil and political rights, a uniform administration* of government. The great stumbling block to these negotiations was found to be the bitter internal feuds, resulting from the war, and

which it seemed nearly impossible to assuage. Conference after conference was held at Fort Smith, Ark., and at Washington, to which place the several tribes sent delegates, and draft after draft of treaties was made in the futile attempt to settle these questions, but through all there appears to have been no questions raised as to the sharing of the vast Cherokee possessions with any people sought to be affiliated with them, except upon the basis of 160 acres *per capita*, to such people, upon payment of a price to be agreed upon. This provoked no opposition, as the proposition was agreeable to the Cherokees; but had the proposition been that these people, in addition to the lands so purchased, should become equal owners of all the immense possessions of the Cherokees, it is folly to presume that this question, going directly to their financial interests to such an extent, would not have awakened their quick and earnest protest.

The negotions begun at Fort Smith were broken off, but resumed at Washington, where delegates from the various tribes had been sent, and a new set of propositions was submitted, among which were:

1st. The proper and just method of adjusting affairs between the loyal and disloyal. (This point applied especially to the Cherokees, where confiscation laws, passed by the National Council, had taken effect upon the property of those who were disloyal.)

2d. The proper relations which Freedman should thereafter hold toward the remainder of the people.

3d. A fair compensation for losses of property occasioned to those who remained loyal by the disloyal party.

4th. Cession of lands by the several tribes to be used for the settlement thereon of Indians whom it was in contemplation to remove from Kansas. (Annual Rp. Com. Ind. Aff's., 1866, p. 8.)

More difficulty was experienced in arriving at the consummation of a treaty with the Cherokees than with

any of the other tribes or Nations, owing to the trouble and animosity existing between the two factions of that Nation, and the question as to what provision should be made for the Freedmen.

Subsequently, and after negotiations to which it is needless to more particularly refer, the treaty of July 19, referred to herein, was entered into.

The second article of this treaty provides for general amnesty between the United States and the Cherokee Nation. The third for the restoration of property or payment of the value thereto, therefore confiscated, and the repeal of all confiscation laws of said nation, against the property of Cherokees who had been identified with the Southern cause.

Articles 4, 5, 6, 7, 8, and 9 are devoted to the regulation of the internal affairs of said nation, and especially to securing to the freedmen and affiliated peoples *equal political and civil rights and equal participation in domestic affairs and the administration of justice.* The following six articles (to article fifteen) are devoted to the details of the organization of the general Indian government.

Thus it will be seen that the whole trend and purpose of the treaties of 1866 were in the interest of securing harmonious political relations among the various factions and elements of these people.

It is in view of all these circumstances and this state of feeling and uniform purpose of the Congress of the United States to suppress factional discord and establish throughout the land, and esqecially in the Southern country where slavery had formerly existed, equal civil and political rights and powers, that we must consider and construe the acts, treaties, and contracts involved in this case.

(For an elaborate and comprehensive history of these transactions, see An. Rep. Comr. Indian Affairs, 1865, page 34, *et seq.*)

The Intendment of the Agreement as shown by its Language and by the Language of the Delaware and Cherokee Treaties.

It will be observed that under the provisions of article four of the Delaware treaty of 1866, only an absolute purchase of lands could be made for their future homes—160 acres for each person—man, woman, or child. It will be further observed that, under the provisions of article fifteen of the Cherokee treaty of 1866, a tribe retaining its tribal relation could be settled in the Cherokee country only upon lands east of the 96°, and there only upon the condition that payment be made at an agreed price *for a specific quantity of land*—160 acres for each man, woman, and child—and a compliance on the part of the tribe so settled, with the other requirements of that article. The Cherokees had been careful to stipulate, all the way along, that Indians to be settled in their country should be limited to an amount of land equal to 160 acres for each person.

It will be further observed that by the agreement between the Cherokees and the Delawares, an absolute purchase at $1 per acre was made of a specific amount of land: 160 acres for each man, woman, and child of the Delawares. As shown by the report of the Indian Office there were 985 Delawares, requiring, at 160 acres each, 157,600 acres, which, at the agreed price, amounted to $157,600, which was exactly the amouut paid to the Cherokees in accordance with the terms and provisions of the fourth article of the Delaware treaty of 1866, and the fifteenth article of the Cherokee treaty of 1866.

It will be further observed, by reference to said agreement that, in addition to the purchase of lands as aforesaid, the Delawares agreed to contribute a certain amount to the Cherokee national fund, in consideration of enjoying "equal rights" with "native Cherokees."

By this part of the agreement, the Delawares were to pay a definite and limited sum stated, which should bear a given ratio to a definite and fixed amount of the Cherokee fund, viz., national fund (cash invested), $678,000, and proceeds of neutral lands in Kansas (estimated), $1,000,000. Against this the Delawares agreeed to put in an amount which should bear the same relation to $1,678,000 that the number of Delawares incorporated should be found to bear to the number of Cherokees, which was subsequently found to be in the proportion of 1 to 13.78, and they consequently paid into the common fund $121,824.28. (Record, page $\frac{26}{}$.)

It will be further observed that, in making up this partnership fund, the vast possessions of the Cherokees west of the 96° and the lands known as the "strip lands" in Kansas, ceded by the seventeenth article of the treaty of 1866, were not in any way mentioned or included, or estimated for in determining the amount of the Cherokee national fund.

That the Delawares at the time of entering into this agreement had no thought of acquiring any interest in any lands other than those specifically mentioned in the agreement is abundantly evident and apparent in almost every line of the instrument itself.

The language of the agreement is a limitation so strict that it cannot be misunderstood; a limitation is clearly declared both as to amount and as to location. Mark how carefully these limitations are expressed:

"The Cherokees * * * agree to sell to the Delawares * * * a quantity of land *east of the 96°*, in the aggregate equal to *one hundred and sixty acres for each individual*, * * * and the selections by the Delawares may be made in any part of the reservation *east of said line of* 96°," etc.

What language could be clearer than this? These new members of the Cherokee political family are to

have a home, but the limits of it are strictly defined, so that there can be no mistake. They are to have 160 acres for each person, regardless of sex or age, no more, no less, and they are told that it must be taken east of 96°, as the lands lying west of that line are not in the transaction. In further emphasis of the fact that this is a specific purchase of a limited and definite amount of land, it will be noticed that the Delawares are careful to secure themselves against the possible contingency that the Cherokee home reservation east of 96° may some day be allotted in severalty, and, for fear there may not be sufficient therein to allow 160 acres to each, they are careful to provide that in such a contingency—

"*One hundred and sixty acres for each individual shall be guaranteed to the Delawares incorporated by these articles,*" *etc.* (*See the Cherokee-Delaware agreement.*)

This precaution alone deprives this transaction of all semblance of the essential features of mutuality contended for by appellees and stamps it as a simple purchase of quantity in place.

Article fifteen of the treaty of 1866, under authority of which the agreement in question was made, is peculiar. It proposes two plans by which friendly Indians may incorporate with the Cherokees. Let us examine them more closely.

The first part of this article provides that, "should any such tribe or band of Indians, settling in said country, abandon their tribal organization," they should be required *only* to pay into the Cherokee treasury a sum of money bearing the same proportion to the national fund as their numbers to the number of Cherokees; but, should such tribe elect to maintain a tribal organization distinct from the Cherokees, then, in addition to the foregoing, they should also pay the Cherokees an agreed

sum for the purchase of 160 acres for each individual incorporated, and should have set apart for them, east of 96°, etc., the amount of lands so purchased.

This proposition, when carefully analyzed, becomes too plain to admit of controversy. At this time the Cherokees had a considerable national fund, which was either invested or held by the Government in trust in lieu of investment, the entire proceeds of which were annually expended in the administration of the Cherokee government, the support of public schools, seminaries, asylums, and the various public institutions there existing, and in the benefits of which such affiliating Indians would become participants to the same extent as native Cherokees. It was therefore provided, in accordance with the plainest principles of justice and fair dealing, that they should contribute an amount to such fund as would maintain its relation to the increased population and not impair or diminish its usefulness or strength. The contribution provided to the national fund was for this purpose, and for this only, and did not and could not contemplate a purchase of any interest in the vast territory of the Cherokee people. Its complete inadequacy for any such purpose is of itself sufficient evidence that no such purpose was contemplated. In fact, as such payment was only to equalize the national fund, which was used wholly for the purpose of carrying on the government, and independent of, and not connected with, any question of property, there would be absolutely no vestige of consideration passing from the Delawares to Cherokees for an interest in these lands, which were and are worth many times the combined value of all the assets mentioned and referred to in the Delaware purchase.

Indians incorporating under the first plan were simply to mingle with the Cherokees on equal civil and political terms, participating in the benefits and protection of

Cherokee laws and administration of justice, with equal advantages of schools, asylums, and institutions supported from the interest of Cherokee funds; and were by such contribution to pay their due proportion of the cost of the administration of the Cherokee government, and that was to be the end of it. In other words, the increase in numbers would increase governmental expenses by just the amount they were paying in, and thus they were simply paying the increase of expenditure their own presence was to occassion, and they could locate upon and *use* any part of the Cherokee domain, without acquiring any title (except to the improvements) just as native Cherokees do to this day. But in case they should elect to maintain some form of tribal organization, which would, in the nature of things, in a measure segregate them from the body of the Cherokee Nation and require their location upon specific property, which they were to *own*, the further provision was made, as a matter of justice to the Cherokee Nation, that lands so exclusively occupied should be paid for at a price to be agreed upon between the contracting parties.

As already herein stated, the fact that this purchase of land contemplated and reached only the specific limit nominated in the instrument itself is apparent everywhere upon the face of the agreement, and is the only conclusion that comports with all the circumstances surrounding the transaction as a whole, and which does not make necessary a strained, forced, unnatural, and illogical interpretation.

The Gross Inadequacy of the Consideration.

The lands "ceded" by the treaty under discussion were the Kansas "strip" and "neutral" lands mentioned in the seventeenth article thereof, and those "authorized to be ceded or sold" were the lands lying west of the 96° and mentioned in the sixteenth article of said

treaty, the latter being the lands from which the funds were received on account of grazing privileges and which form the nominal basis of this suit.

As stated, at the time this agreement was entered into, the Cherokee Nation was possessed of the following lands:

"Strip" lands in Kansas . . . . . .
"Neutral" lands in Kansas . . . . . .
Lands west of 96° in the Indian Territor (about) . . . . . .
Lands east of 96° in the Indian Territor (about) . . . . . .

These lands, estimated at the nominal value of $1.25 per acre, except the neutral lands, which we will value at $1,000,000, as stipulated in the agreement, were worth at the date of said agreement, $17,750,000; now add invested funds, $678,000, and we have the total wealth of the Cherokees, $18,428,000.

This estimated value is the minimum price of public lands, and the price at which the strip lands were afterwards sold—these values are really only nominal. The actual values, if the Cherokees had been permitted to handle their own lands, would have been many times greater.

At this time the population of the Cherokee Nation was about 13,000, making a *per capita* wealth upon this extremely low estimate of $1,416 for men, women, and children. Now, as stated, the Delawares incorporated under this agreement numbered 985, and they paid to the Cherokees for land $157,600, and to the national fund $121,824.28, making a total of $279,424.28, a *per capita* sum of $283.68.

In other words, we are asked to believe that these shrewd Cherokees, with a *per capita* wealth of $1,416,

Cherokee laws and administration of justice, with equal advantages of schools, asylums, and institutions supported from the interest of Cherokee funds; and were by such contribution to pay their due proportion of the cost of the administration of the Cherokee government, and that was to be the end of it. In other words, the increase in numbers would increase governmental expenses by just the amount they were paying in, and thus they were simply paying the increase of expenditure their own presence was to occassion, and they could locate upon and *use* any part of the Cherokee domain, without acquiring any title (except to the improvements) just as native Cherokees do to this day. But in case they should elect to maintain some form of tribal organization, which would, in the nature of things, in a measure segregate them from the body of the Cherokee Nation and require their location upon specific property, which they were to *own*, the further provision was made, as a matter of justice to the Cherokee Nation, that lands so exclusively occupied should be paid for at a price to be agreed upon between the contracting parties.

As already herein stated, the fact that this purchase of land contemplated and reached only the specific limit nominated in the instrument itself is apparent everywhere upon the face of the agreement, and is the only conclusion that comports with all the circumstances surrounding the transaction as a whole, and which does not make necessary a strained, forced, unnatural, and illogical interpretation.

The Gross Inadequacy of the Consideration.

The lands "ceded" by the treaty under discussion were the Kansas "strip" and "neutral" lands mentioned in the seventeenth article thereof, and those "authorized to be ceded or sold" were the lands lying west of the 96° and mentioned in the sixteenth article of said

treaty, the latter being the lands from which the funds were received on account of grazing privileges and which form the nominal basis of this suit.

As stated, at the time this agreement was entered into, the Cherokee Nation was possessed of the following lands:

	Acres.
"Strip" lands in Kansas	400,000
"Neutral" lands in Kansas	1,000,000
Lands west of 96° in the Indian Territory (about)	8,000,000
Lands east of 96° in the Indian Territory (about)	5,000,000

These lands, estimated at the nominal value of $1.25 per acre, except the neutral lands, which we will value at $1,000,000, as stipulated in the agreement, were worth at the date of said agreement, $17,750,000; now add invested funds, $678,000, and we have the total wealth of the Cherokees, $18,428,000.

This estimated value is the minimum price of public lands, and the price at which the strip lands were afterwards sold—these values are really only nominal. The actual values, if the Cherokees had been permitted to handle their own lands, would have been many times greater.

At this time the population of the Cherokee Nation was about 13,000, making a *per capita* wealth upon this extremely low estimate of $1,416 for men, women, and children. Now, as stated, the Delawares incorporated under this agreement numbered 985, and they paid to the Cherokees for land $157,600, and to the national fund $121,824.28, making a total of $279,424.28, a *per capita* sum of $283.68.

In other words, we are asked to believe that these shrewd Cherokees, with a *per capita* wealth of $1,416,

were willing to take into their fold, in full participation in all their possessions, 985 Delawares, bringing with them a *per capita* payment of but $283.68, thereby decreasing the *per capita* wealth of the Cherokees—men, woman, and children—nearly $100, and increasing the *per capita* wealth of the Delawares nearly $1,100! Yet this is the construction the court is asked to put upon this agreement, and that, too, in the face of and against its plain letter and more reasonable construction.

But this is not all. This contract distinctly states:

"And, that there may be no doubt hereafter as to the amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000.

"And the Delawares further agree that in calculating the total amount of said national fund there shall be added to the said sum of $678,000 the sum of $1,000,000, being the estimated value of the *Cherokee neutral lands in Kansas*, thus making the whole Cherokee national fund $1,678,000; and this last-mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund."

Now the "strip" lands in Kansas were disposed of under the identical article of the same treaty as these "neutral" lands. There were also some 8,000,000 acres of lands lying west of 96° authorized by the same treaty "to be ceded or sold;" yet these are not mentioned and are not spoken of as elements in determining the "basis for calculating the amount which the Delawares are to pay into the common fund." It can not be said they were overlooked or left out of the count because of unimportance, for they constituted more then half the entire wealth of the Cherokee Nation. The conclusion is inevitable that they were omitted *by intention.* The Chero-

kees were not selling an interest in them and the Delawares were not buying such an interest. It was more then sixteen years after this time before the Delawares conceived the idea of making this extravagant claim, and it was suggested by the distribution of $300,000 to Cherokees by blood, which sum had been appropriated on account of lands west of the 96° by act of Congress of March 3, 1883. (22 Stat., 624.)

There is no more familiar maxim of law than *expressio unius est exclusio alterius*, the expression of one is the exclusion of others. The agreement in question, in order "that there may be *no doubt hereafter*" as to the amount of Cherokee resources *to be affected by it*, specifically enumerated just what should be included. In the expression of these, by a rule of construction as old as jurisprudence itself, and sanctioned by centuries of judicial recognition and approval all over the world, all else was and is excluded as completely and absolutely as if such exclusion had been expressed in terms the most positive and emphatic. Thus is this most unreasonable contention that an entire community of interest existed between those parties, equally unsustained by the plain letter of the instrument itself and the necessary and well established rules of interpretation.

But even this is not all We are told that under this agreement there was to be complete mutuality and that all possessions of the Cherokees were to be shared with their brothers, the Delawares, without any reservations, and this, nothwithstanding the fact that they had paid but about one-seventh of the amount ratably due on an estimate far below actual value. This would seem unfair enough, but it is the least unconscionable part of it. While the Delawares were thus demanding so much for so little in this "mutual" compact, it appears from the report of the Indian Office (Record, page $\frac{45}{46}$) that they were holding back as private and personal funds from the

Cherokees nearly a million of cash assets ($889,191.04) the annual interest of which they were then receiving and distributing to the *Delawares by blood only*, and continued so to receive and distribute for twenty-five years thereafter, to the exclusion of their genereous Cherokee brothers, whom the Delawares are insisting shall not be permitted to enjoy any *exclusive* benefits. They here and now declare that all of the Cherokee possessions and income must enrich the "mutual" coffers, to which the Cherokees have already contributed 700 per cent. more than these foster brothers.

It will occur to the most casual with irresistable force that the mere suggestion of the fact that these Delawares themselves held out from the common treasury every cent of their tribal funds not mentioned in said agreement, and required by its terms to be paid, falsifies the whole structure, purpose, and character of appellee's case.

Let us, then, briefly consider just what the Delawares sought by this agreement, what they paid for, and what they got. They had sold their lands in Kansas and wanted a home in the South. The Government of the United States had agreed to secure them such a home. And to what extent? An undivided interest in some fourteen million acres of land? Surely not. The Delaware treaty speaks for itself. By the fourth article thereof, the United States was to provide them homes in the Indian country, south of Kansas—"*a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove*," *etc.*, to be paid for out of the proceeds of the sales of the Delaware lands in Kansas. To accomplish this was the obligation assumed by the United States. To accomplish this was the object and purpose of the Delawares themselves, and they expected nothing more. But, in order to secure them a safe home, with the advantages of good government,

schools, churches, asylums, seminaries, etc., together with protection of life and property and equal participation in the administration of public affairs, the government arranged that they should pay into the Cherokee fund an amount of money bearing the same relation to the Cherokee national fund, *then existing*, that their numbers did to the whole number of Cherokees. As this national fund was simply and solely an administration fund, and its proceeds used for no other purpose, there was no hardship in that. The $1,000,000 coming from the "neutral" lands was added, for the reason that the proceeds of those lands were to be placed in this same general administration fund as soon as received, and, in fact, were so placed. The other properties of the Cherokees were *not mentioned*, because it was *not contemplated* that the proceeds of any of them would ever be added to this fund, but as a matter of fact a large part of the proceeds of the "strip" lands was added, and the benefits of it have since been enjoyed by these Delawares equally with the Cherokees, without the payment of a cent in consideration therefor. The Delawares did not put all their funds into the common till, for the reason that they had paid all their purchase had called for; but, when the common fund was swelled beyond the limits contemplated in the agreement, they ought in good conscience and common fairness to have put in their proportion, out of the abundant means they were holding back and enjoying as exclusive Delaware funds.

They had not been required to pay in a larger amount, because they were then seeking to provide for the payment of *their share* of the *public expense*. The existing Cherokee fund was supporting the existing government, and their numbers would increase expenses by just the amount to be realized from the investment of the *equalizing* funds paid in by them.

The fact is too evident to admit of argument that these Delawares, after purchasing the exact quantum of land contemplated in all these treaties and in the agreement stipulated, contributed a given amount to the national fund, to be used in the general administration of the government, to secure to them equal civil and political rights and participation in public affairs, and that, beyond and besides this common fund thus created, *both parties* had and possessed, and have ever since continued to possess, separate funds, in and to which the other has had no right, claim or interest.

Within the last three years, and since the agitation of the unreasonable claim set up in this suit, these same Delawares have caused the entire balance of their separate funds amounting to nearly $900,000 to be paid out *per capita* to Delawares only. (26 Stat., 1011.)

If our contention herein could by any interpretation be held to be not correct, still this plaintiff would be in no better plight, and this fact further establishes the soundness of our position beyond a peradventure; for if the Delawares are to claim an interest in all this Cherokee domain, then they ought to have contributed in that proportion, thereby bearing the burdens while enjoying the benefits. They have not, by their conduct, viewed in this spirit, fulfilled the requirements of article fifteen of the treaty of 1866, which distinctly provides that—

"The said tribes, thus settled, *shall also pay into the national fund a sum of money* to be agreed on by the respective parties, not greater in proportion to the whole existing national fund *and the probable proceeds of the lands herein ceded or authorized to be ceded or sold* than their numbers bear to the whole number of Cherokees then residing in said country and thenceafterwards they shall enjoy all the rights of native Cherokees."

The lands "ceded" by the treaty were the Kansas "strip" and "neutral" lands mentioned in the seven-

teenth article thereof, and those "authorized to be ceded or sold" are the lands lying west of the 96° and mentioned in the sixteenth article of said treaty. Has the above-quoted provision of the treaty been carried out? Most certainly not! Even the not-over-sensitive Delawares have not the temerity to make such a claim, and the agreement does not even hint at it. As stated before, they were not attempting to purchase so much as this, and the Cherokees were not undertaking to sell. This agreement was simply carrying into effect a *portion* of the powers granted by said article fifteen, and the extent to which such powers were being exercised and of the rights and benefits pufchased by said Delawares was clearly and plainly set out and expressed in said agreement. In other words, our contention is that the Cherokees and Delawares, by their contract of April 8, 1867, did not *intend* to exercise *all* the powers contemplated in section fifteen of the treaty of 1866 (14 Stat., 803), which provided for the payment to the Cherokees of an amount "sustaining the same relation," to the then existing Cherokee national fund "*and the probable proceeds of the lands herein ceded or authorized to be ceded or sold*, as the number," etc.

As stated, the lands "ceded" by that treaty were the "neutral" and "strip" lands in Kansas, and the lands "authorized to be ceded or sold" were the lands west of 96° in the Territory, known as the "outlet lands," thus including *all* the Cherokee domain except the "home reservation" consisting of the lands east of 96°.

When the two parties came together for the purpose of entering into this agreement, for reasons obvious in the record, the Delawares concluded to purchase *only* an interest in the Cherokee national fund as it then existed, and the probable proceeds of the "neutral lands," leaving the "strip" lands, the land west of 96° and the home reservation, except the 157,600 acres specified in

the agreement, out of the count. As already shown, to have purchased an equal interest in *all* the domain of the Cherokees, including the lands west of 96°, on the basis of the price agreed upon for the neutral lands, and that actually realized in the sale of the strip lands ($1.25 per acre) *would have vastly exceeded the amount of funds possessed by the Delawares*, and would have rendered any trade between them impossible.

The "neutral" lands constituted but a comparatively insignificant part of the possessions of the Cherokee Nation. It is unreasonable to contend that in a transaction of this importance either party would be content to provide *specifically* and *directly* for only a comparatively small element in the consideration, and leave all the balance of the vast domain of the nation to pass by simple *inference*. Such a contention is far-fetched, strained, illogical, and unreasonable. The fact is, the Delawares purchased as much of the benefits that the Cherokees were authorized to sell, under the treaty of '66, as they had contemplated purchasing under their own treaty. To have gone further and purchased an interest in the Cherokee lands "authorized to be ceded or sold," *i. e.*, the lands west of 96°, would have been beyond their power for want of funds. Hence they purchased what they could pay for, and that there might be no mistake or misunderstanding as to what that was, it was distinctly nominated in the agreement.

Why should the Delaware have the *exclusive* right to the 157,600 acres of land, and *equal* rights with the native Cherokee in all the rest of the land? Has he paid for any such rights? The value of these lands reached many millions. If the Delawares were to have been really endowed with all these privileges, it is quite probable that the agreement would have been worded something like this:

"And in addition to the 157,600 acres thus sold to the Delawares for their occupancy, they shall share equally with the native Cherokees in the general possessions of the Cherokee people. That in addition to sharing in the $1,678,000 national fund of the Cherokee Nation, which 'there may be no doubt' about hereafter, the Delawares, while enjoying $889,191.04 exclusively of their own funds, shall be entitled, without contributing further to the Cherokee national fund, to any and all augmentations thereof. And it is further agreed and understood by and between the parties that the Cherokee Nation shall augment said fund by all available moneys from leases or sales of its lands wheresoever situated and leased or sold.

"And as a further right secured to the Delawares by this agreement, they shall have a common interest in all invested funds of the Cherokee Nation, and all funds held in trust by the United States, without being required to allow the Cherokee people to share in any funds of the Delawares, held by the United States for their benefit."

But such provisions are conspicuously absent. It never was intended that such matters should be included by implication. There was no reason why such things should be named. The Delawares had the best end of the bargain as it was. Good conscience does not require that the great advantage gained by them in their arrangement with the Cherokees should be extended to other things not thought of—not mentioned at the time the bargain was made—but rather a more strict adherence to the plain intendment of the contract.

The contract of incorporation is not couched in ambiguous terms. It plainly says that the Delawares shall have the right to occupy the 157,600 acres of land they bought; that they shall have an interest in the national fund of $1,678,000; that they should in addition to this

have and enjoy all the rights of the native Cherokee—*i. e.*, civil, political and personal. Those rights so persistently contended for by the Government, and which had become a pivotal consideration in all the treaties and agreements of the period.

This is certainly enough. They ought not to complain. The contract of incorporation does not include the remainder of the lands of the Cherokee people. It does not include the rents and profits thereof. It therefore cannot include the $593,625 received on account of the grazing privileges from the Cherokee Strip Live Stock Association. It includes no part of the $300,000 appropriated by the act of June 16, 1880. It does not include the $1,099,137.41 held in trust for the Cherokee Nation by the United States on account of sales of land to the Osages. Neither does it include any other trust funds thus held, and more important than all, it does not include any portion of the $8,595,674.12 for which these lands west of the 96° have recently been sold to the United States.

The amount, $121,824.28, paid by the Delawares to equalize (maintain) the national fund, was not paid *to* the Cherokees, but transferred to their credit as an invested fund or held in trust in lieu of investment by the United States, that, as already stated, the interest derived from it might pay the proportion of the public expenses occasioned by their presence in the country. Only that and nothing more. That money has ever since remained in the hands of the United States as a permanent investment, and the interest upon it has been paid semi-annually and used toward the support of the general Cherokee government.

The present national fund of the Cherokees is $2,636,634.13 (Record, page 6), all of which is held by the United States as a specific trust. The interest at 5 per cent. per annum, is paid semi-annually, and by the terms

of the treaty of 1866 (Art. 23, 14, Stat. 805), is distributed into separate funds, and devoted to the maintenance of the various branches of the Cherokee government and public institutions. No part of this fund can be diverted to any other use except by the joint consent of the Cherokee Nation and the Congress of the United States; and should the Cherokee Nation be dissolved and its funds capitalized and paid out *per capita* to its citizens, these Delawares would receive back every cent of the amount so paid into said fund by them, and this without reference to proceeds of the "strip" or "outlet" lands. The growing population and increased demands have required a corresponding increase of national (invested) funds. The consolidated fund under the agreement was $1,799,824.00. There seemed to be no machinery for compelling the Delawares to supply their proportion of increasing demands, and the Cherokees have alone increased said fund to $2,636,634.00, from their private resouces (*i. e.*, sales and leases of land), without any aid from the Delawares, although they have received their proportion of the benefits. It would seem the more gratuities they receive, the more exorbitant become their demands.

In the argument of the case below, and in the opinion of the court below, much stress was and is laid upon the change in the Cherokee constitution by the adoption of an amendment November 29, 1866.

This amendment to article three of the constitution, including the affiliating Indians in the term "citizen," is the concluding portion of the identical *paragraph* which defines eligibility to office, thus emphasizing the fact that the Cherokees all the time had *political* equality in mind with reference to these people, and *not* property rights, and is in perfect harmony with our interpretation of this agreement. In that amendment (section 5) they say: "No person shall be eligible to a seat in the national

council but a male *citizen*," and the paragraph concludes: "All native born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen * * * shall be taken and deemed to be citizens of the Cherokee Nation." There is no possibility of mistaking the intention of this amendment. These two provisions are in the same section and not even separated by a *paragraph.* It provides that citizens may have certain rights, and then in order that its agreement to admit these other classes upon equal terms *in the government* may not fail, it goes on and extends the term "citizen" over them, unquestionably for the purpose already in the paragraph mentioned, which is, that they may be eligible to a seat in the council, equally with a native. That is the only subject under treatment. There is not a word in this whole amendment, consisting of seven sections, that in any way touches, directly or indirectly, the subject of property. It is wholly and solely upon the subject of the organization and administration of the civil government.

The only conclusion that can, with any show of reasonableness, be drawn from the adoption of this amendment, is that the Cherokees were endeavoring to make good their promise to endow these affiliated people with equal civil and political rights.

Much stress has also been laid upon the fact that in 1880, $300,000 was received by the Cherokee Nation from the United States on the general account of lands west of 96°, and paid out by order of the National Council to all citizens of the nation, including the Delawares, thus admitting, as it is claimed, the rights of the latter to participation.

In that year there was a famine in the Indian Territory. Two failures of crops had reduced the people almost to starvation. In this emergency the nation asked the United States to advance it $500,000 to re-

lieve distress, the amount to be charged to the general account of lands west of 96°. Congress, by act approved June 16, 1880 (21 Stat. 248) appropriated $300,000, which was paid to the Cherokee Nation, and by its council appropriated by an act entitled "An Act to Provide *Breadstuffs* for the Cherokee People." That this was simply an act of humanity, in a time of common and extreme need is too apparent to need argument. To have stopped to discriminate as to who might be, by blood, entitled to this *bread-money*, at such a time, would have been inhuman.

The language of the act of Congress making this appropriation is sufficiently clear as to its purpose:

"That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the treasury of the Cherokee Nation, out of the funds due said nation, for its lands in the Indian Territory west of the Arkansas River, as per estimates of the Secretary of the Interior, and which sum shall be expended, as the acts of the Cherokee Legislature direct, to relieve the destitution of the Cherokee people, caused by the failure of the crops during the past season by reason of the drought; this amount to be immediately available."

But there are two very remarkable things about this piece of history that make the calling of it as a witness by the appellees a most unfortunate circumstance. First, the language of the act of the Cherokee Council providing for the distribution of this money is significant: "That the funds obtained under the provisions of this act shall be paid out, *per capita*, to the whole people of the Cherokee Nation on the census roll of the census of the Cherokee Nation to be taken in 1880, as provided for in section three of the amendment of article three of the constitution."

If these Delawares, Shawnees, and freedmen were *entitled* to receive the benefit of the proceeds of these lands

of right, and such right was admitted, and if this act was a recognition of such right, then what necessity existed for such strained particularity in providing that this bread-money should be distributed "to the whole people of the Cherokee Nation," as shown by the census roll of the census to be taken under the amendment to the third article of the constitution?

The basic principles of the interpretation of statutes must be applied even to the somewhat primitive legislation of these people, and there is no more familiar rule than that all statutes must, if possible, be so construed as to give force, meaning and *purpose* to every provision; and this language proves, if it proves anything, that it was deemed necessary to thus specify that no one within the Cherokee Nation should be excluded from the benefits of this charity, in order to bring these affiliated peoples within its operation. So that the very language of this act contradicts the proposition that it is invoked to sustain.

But this is not the most singular part of it. This act is dwelt upon as constituting an admission of the claim of appellees because they were equally *included* in its benefits, and at the same time these people, who cannot be charged with too great modesty in the matter of reaching for about everything in sight, ask for a judgment for an amount equal to their pro rata share of this same three hundred thousand dollars, on the ground that they were *excluded* from its benefits by the Cherokee Nation! (See Count 5, of petition, record, page 5 .)

There is another proposition which presents itself forcibly to this discussion, and that is:

The Absolute Right of Self-Government in the Cherokees.

That the Cherokees possess the sole and exclusive right to manage their own internal affairs and of control of the persons and property of their citizens, there has been no question for more than half a century, and this right has been recognized by the government of the United States, by an unbroken current of precedents through all this time.

The object of the Cherokee treaty of 1835 (7 Stat., 478) as recited in the preamble thereto, was to reunite their people in one body and secure a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the state sovereignties, and where they could establish and enjoy a government of their choice and perpetuate such a state of society as might be most consonant with their views, habits and conditions, and might tend to their individual comfort and advancement in civillization.

Article five of the treaty provides:

"But they (the United States) shall secure to the Cherokee Nation the right by their National Councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country belonging to their people or such persons as have connected themselves with them."

By article thirteen of the treaty of 1866, it was agreed that the United States might establish courts in the Indian Territory, with the proviso however:

"That the judicial tribunals of the (Cheorkees) Nation shall be allowed to retain *exclusive* jurisdiction in all civil and criminal cases arising within their (the Chero-

kees) country, in which members of the nation, by nativity or adoption, shall be the only parties, or when the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." (14 Stat., 803.)

The Court of Claims in speaking of the government of the Cherokee Nation says:

"It has its territorial possessions and boundaries, its constitution (very much like the constitution of the United States) its laws, its executive, legislative and judicial departments, with none of which can any state or the United States interfere." (20th Ct. of Claims, 449.)

The fact is that for more than a half century the right has been recognized in the Cherokee Nation to make such laws for the government of persons and property within its jurisdiction, and to make such disposition of its public funds as it may see fit. That right has never been questioned, but, on the other hand, has been sanctioned by the executive departments of the government, and the principle recognized by the Supreme Court of the United States. (5 Peters, 1; 6 Pet., 515; 18 Howard, 100; 20 Court of Claims, 449; 117 U. S., 288.)

The Secretary of the Interior (Mr. Teller) in speaking of the right of the Cherokee Nation to control and dispose of its property in such manner as it may see fit, in a letter to the Persident *pro tempore* of the Senate, dated January 13, 1885, says:

"The rights reserved to the United States are clearly expressed in the several treaties, and the right of the United States to control the Cherokee property and prevent the nation from having the *full and absolute* control of the product of these lands is not even suggested."

On the contrary, the government guarantees, in article twenty-six, as follows:

"The United States guarantee to the people of the Cherokee Nation the quiet and peacable enjoyment of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes. They shall also be protected against interruprions or intrusions from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done."

The Department has not considered it the duty of the Commissioner of Indian Affairs or the Secretary of the Interior to interfere with the affairs of the Cherokee Nation, except in the case expressly provided by treaty with that nation. (See Senate Ex. Doc. 17, 48th Cong., 2d Sess., page 6, and approvingly referred to by the Court of Claims in the case of the Eastern Band of Cherokees *vs.* The United States and the Cherokee Nation, 20 Court of Claims, 449.)

The Cherokee Nation has a right to stand upon its contracts and its treaties, and no acts of Congress and no proceedings of the political departments of the government can take away its vested rights guaranteed by such traties (20 Court of Claims, 481) and confirmed by this court. (117 U. S., 288, hereinbefore referred to.)

This rule was applied in the same decision to the funds received by the Cherokee Nation on account of the sale of a portion of its lands by article seventeen of the treaty of 1866.

This same principle was recognized by the legislative branch of the government by an item in the Indian appriation bill of March 3, 1875, which provides:

"* * * and the United States assistant treasurer at St. Louis, Missouri, be, and he hereby is, authorized to open and keep accounts with the duly constituted treasurer of the Cherokee, Creek and Chocktaw and Chickasaw Nations of Indians, the same as with the government agents and disbursing officers." (18 Stat., 448.)

Under this provision of the law the funds of the Cherokee Nation, due from the government, are placed with the assistant treasurer at St. Louis and are drawn therefrom by the treasurer of the Cherokee Nation and disposed of by him as the acts of the Cherokee National Council may direct. Again, the appropriations made by the act of June 16, 1880 (21 Stat., 228) and March 3, 1883 (22 Stat., 624) were both made "to be expended as the acts of the Cherokee legislature direct."

Upon this point, and to further illustrate it, we invite attention to an item in the Indian appropriation act of March 3, 1891, making appropriation to pay the Choctaw and Chickasaw Indians for certain lands in the Indian Territory (26 Stat., 1025) and the action taken thereon.

Under date of April 11th, 1891, the Council of the Choctaw Nation passed an act entitled,

"An act authorizing distribution *per capita* of the money due to the Choctaw Nation for the sale of a portion of the leased district under act of Congress, approved March 3, 1891."

The first section reads as follows:

"Section 1. Be it enacted by the General Council of the Choctaw Nation assembled, that the sum of one million, six hundred and fifty-seven thousand, six hundred and ninety-one dollars, being the balance after deducting the delegate's per cent., and twenty-five thousand and five dollars, for necessary expenses in procuring and distributing the same, shall be paid out *per capita* among the Choctaw citizens *by blood* residing in the Choctaw and Chickasaw Nations at the date of this act."

This act excluded from sharing in the distribution of that fund all persons who are recognized as members of the Nation by virtue of the thirty-eighth article of the Choctaw and Chickasaw treaty of 1866 (14 Stat., 779), whose status is fixed by the twenty-sixth article of that treaty. This matter having been submitted to the Attorney General, he rendered his opinion thereon in a letter to the Secretary of the Interior, under date of July 28, 1891, as follows:

"DEPARTMENT OF JUSTICE,
"WASHINGTON, D. C., *July* 28, 1891.

"SIR: The Commissioner of Indian Affairs left at this department a few days since an opinion perpared by Mr. Assistant Attorney General Shields, touching the question of the rule of individual distribution among the Choctaw and Chickasaw Indians of the appropriations made by last Congress (26 Statutes at Large, 1025), with an oral request for an opinion from this Department touching that subject matter.

"The act of Congress, after making the appropriation, provides:

"'That three-fourths of this appropriation be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such times and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such times, and in such sums, as directed and required by the legislative authority of said Chickasw Nation.'

"This language plainly has reference to the payment of these moneys in bulk to the repersentatives of the Choctaw and Chickasaw Nations and imposes no duty upon the Secretary of the Interior with reference to the individual distribution of the same. The persons entitled to such distribution, the evidence necessay to establish their claims, and the manner of such distribution are all matters to be regulated by the laws of the

Chocktaw and Chickasaw Nations, respectively, subject, doubtless, to the rule that such laws must not be in conflict with the constitution and laws of the United States.

"It is not apparent, therefore, that any question is presented to the honorable Secretary of the Interior for decision requiring an opinion from the Attorney General under section 356 of the Revised Statutes. *Any decision by the Secretary or opinion by the Attorney General as to who are the proper distributees of this fund would be wholly inconclusive and, as I conceive, outside of duties imposed by law, scarcely less so than if we should attempt to determine what should be done with the moneys paid to the several states under the act providing for the refunding of direct taxes or fix the rule for the distribution of descendents' estates in one of the Territories.*

"At any rate this request contains no statement of facts and formulates no question of law for my consideration.

"Under the circumstances, therefore, the papers are returned without the opinion asked.

"Very respectfully,

"W. H. H. MILLER,

"*Attorney General.*

"The SECRETARY OF THE INTERIOR."

This case is identical in principle with the one under consideration, and the opinion of the Attorney General fully sustains the position for which we contend. The moneys being disposed of were moneys arising out of the "public lands of the Chocktaws and Chickasaws," and the persons asking to share were citizens adopted under the Chocktaw and Chickasaw treaty of 1866, the sister treaty to the Cherokee treaty of the same year.

So, if we admit for the sake of argument that the Delawares, under the agreement in question, have an interest in all the common property of the Cherokee Nation, that nation, under the decisions of the Court of Claims and this court, the opinion of the Attorney Gen-

eral and Secretary of the Interior, has a perfect right to make such disposition of its lands and moneys as it may see fit and proper, whether effecting members by blood or adoption, and there is no right or power vested or reserved in the United States to interfere. As a matter of fact, if we apply the principles laid down by the courts, the Attorney General and the Secretary of the Interior, which recognize the absolute unrestricted right of self-government in the Cherokee Nation as to its internal affairs, and the right guaranteed to that Nation "to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country belonging to their own people or such persons as have connected themselves with them," then the United States Government has no more control over the public property of that nation or the action of its legislature in connection therewith, than it has over the public property or legislative acts of a state or territory.

The relation of the United States to the funds now in the treasury belonging to the Cherokee Nation is simply that of trustee, but as to funds that they may come into possession of that nation, and not thus held, the disposition thereof is a matter over which the United States have no control whatever, either as trustee or otherwise.

Recurring to the original proposition with which this argument began, we call the attention of the court to the significant parity of expression between the fourteenth amendment to the federal constitution, and the clauses of the agreement in question.

The fourteenth amendment to the constitution provides that "no State shall make or enforce any law which shall abridge the *privileges or immunities* of citizens of the United States," etc.

The Cherokee-Delaware agreement provides that the Delawares shall be admitted with "the same rights and immunities," etc. Almost the identical language of the fourteenth amendment to the constitution of the United States, which was at that time pending before the legislatures of the several States of the Union.

In the case of Strander *vs.* West Virginia (100 U. S., 303) speaking of the fourteenth amendment, the court say:

"This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated * * * all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as are said in the slaughter-house cases (16 Wall., 36), cannot be understood without keeping in view the history of the times when they were adopted and the general objects they plainly sought to accomplish. * * * It was designed to assure to the colored race the enjoyment of all the civil rights, that under the law are enjoyed by white persons, and to give to that race the protection of the general government. * * * The fourteenth amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms. * * * Its language is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is immunity from inequality of legal protection," etc.

It seems too plain for serious controversy, that by the use of the expressions in the treaties and contract under consideration, the same purpose was in mind, the same object aimed at and the same mischief sought to be remedied, as in behalf of the liberated slaves by the thirteenth, fourteenth and fifteenth amendments to the federal constitution, and the civil rights act.

To multiply illustrations tending to show the thought purpose and intent running through the various treaties with the five civilized tribes in 1866, and the agree-

ments growing out of them, would be to expand this brief far beyond the limits of both necessity and propriety. It will hardly be contended, we should think, that the government intended to inflict upon these Indian tribes any greater punishment for having permitted the institution of slavery in their midst than it did upon the more highly civilized people of the southern states who were responsible for it, and who set the example. Yet we find the ninth article of this same treaty, when discussing the negro branch of the question, providing that:

"The Cherokee Nation having voluntarily, in February, eighteen hundred and sixty-three, by an act of their National Council, forever abolished slavery, hereby covenant and agree that never hereafter shall slavery or involuntary servitude exist in their nation otherwise than in punishment of crime, whereof the party shall have been duly convicted in accordance with laws *applicable to all members of said tribe alike.* They further agree that all freedmen who have been liberated by the voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return in six months, and their descendents *shall have all the rights of native Cherokees;* provided, that owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated."

Here, again, we have the same dominant thought and purpose—the firm establishment of civil rights. It is distinctly emphasized that the penal laws shall be "applicable to all members of said tribe alike," and then that these freedmen shall have "all the rights of native Cherokees." There is absolutely no vestige of justification for the pretense that the government intended to confer upon these former bondmen any part of the ancestral possessions of the Cherokees. Such a

proposition is preposterous and outrageous upon its face. These people were far less guilty than the people of the several confederate states, and no thought of compelling them to contribute of their material possessions for the benefit of their freedmen was ever entertained. Even the loss of the value in the slave property itself was considered a great hardship, and by many thought to be unjust, but to add to this the penalty of a payment of property to the liberated slaves by their late owners was never dreamed of. We cannot, then, infer such an intention with respect to the freedmen of the Cherokees. Their condition was in no wise worse than that of the freedmen of the southern states, and there is no reason, there is no *excuse* for such a contention. Yet it will be seen that the language here used bears a most striking resemblance to that used in the portions of the treaties referring to the Delawares and Shawnees, and in the agreements entered into under authority thereof. The freedmen were to "have all the rights of native Cherokees."

This brings us to a closer consideration of the proposition upon which the court below base their opinion. As to the objects sought to be accomplished in the beginning, by the treaties and agreement in question, the court seem to agree fully with our view. They say:

"The agreement accordingly provides that the Delawares shall contribute a proportionate amount and be thereafter jointly and severally and equally interested with the Cherokees in the augmented fund. The number of the communal owners was fixed or made ascertainable by the agreement, the amount of the primary fund in the treasury was known, the amount to be paid in was a simple matter of calculation, and the result was that the arrangement left the individual interests of the communal owners percisely what they were before, each Delaware and each Cherokee continuing to receive, directly or indirectly, *per capita*, the same dividend that he

would have received if the merger of their funds had not taken place. This part of the agreement has not been susceptible of misconstruction and concerning it no controversy has arisen.

"There being thus established one communal fund to which all were to contribute equally and in which all were equally to share, the agreement further provides for the sale of land in the Cherokee country to the Delawares which should furnish homesteads for these new inhabitants and future citizens of the Cherokee Nation; and it is this part of the agreement from which the controversy of the case has sprung.

"This land which the Cherokees 'agree to sell to the Delawares for their occupancy' is to be enough for the agricultural homes of the new inhabitants and no more.

"The quantity is fixed at and limited to 'one hundred and sixty acres of land for each individual of the Delaware tribe.'

* * * * * * *

"It seems plain to the court that this part of the agreement is for the sale of a specific thing for a specific price. It indeed merely fixes the rate per acre at which land may be purchased, and leaves the Delawares free (within certain restrictions) to take as much or as little as they needed. If they took 50,000 acres they would pay $50,000; if they took 51,000 acres they would pay $51,000. As a matter of fact, they took 157,600 acres, and paid $157,600. The money was the consideration named for the land, and the land the consideration named for the money. The Cherokees as grantors conveyed no right or interest other than in the lands sold, and the Delawares as grantees acquired no right or interest in lands other than those for which they paid. As to the communal element of the estate conveyed, considered in the abstract, it is manifest that while the lands granted remained communal they were not owned in common by the Cherokees.

"The right of occupancy and the remote right to the fee were both vested in the Delawares. The agreement expressly excluded the Cherokees from any right of property in the lands of the Delawares, and by implication (in the absence of a provision to the contrary) ex-

cluded the Delawares from any right of property in the lands of the Cherokees. After it was executed and its covenants performed, there would be two communities in the Cherokee country, and each in the matter of property, so far as the agreement was involved, would be independent of the other; but the property rights of both would be subject to the constitution of the Cherokee Nation, and (within constitutional limitations) to the laws of the Cherokee government.

* * * * * * *

"After all due allowances have been made, it is apparent that the Delawares retained their separate national fund of $889,191 in the treasury of the United States as their separate property; and that the property of the Cherokees vastly exceeded that which they contributed to the communal estate and the consideration which they paid for a foothold in the Cherokee country. Moreover, as citizens of the nation they have had the benefit of the moneys derived from the Cherokee Strip, and the national fund has been augmented and augmented until it now amounts to $2,636,634, and to this augmentation the Delawares, as Delawares, have contributed nothing."

But, the court find that the Cherokee Nation has permitted its ambition to soar. In its unguarded moments of self-pride it has allowed itself to borrow fatal expressions from its grand neighbor, and in its public acts has spoken of its unoccupied lands as its "Public Domain." From this, and from the fact that the Cherokee Nation has found it convenient to deal as to its public lands through the medium of a delegate body, the court discovers an analogy to the public domain of the United States, which is the property of the nation as a *political* body, and as to which there are no distinctions among the *citizens* of the nation; and as the Delawares are, by the amendment of the third article of the Cherokee constitution, made *citizens* of that nation, the court conclude that as such citizens they stand in the same light

toward the Cherokee "*domain*," that citizens of the United States do to our public domain.

We are forced to take issue, both with the premise and conclusion of this proposition—the first underlying assumption of it is an error—the Cherokee Nation is *not* a nation in the sense that the United States is a nation. This has been so repeatedly decided by this court that it is hardly necessary to reiterate it.

In the Cherokee Nation *vs.* the Southern Kansas R. R. Co. (135 U. S., 641) this court say:

"The proposition that the Cherokee Nation is sovereign, in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the treaties with the Cherokee Indians, or the decisions of this court, or in the acts of Congress defining the relations of that people with the United States."

That being true, it follows that the Cherokee Nation, so called, cannot and does not possess a "public domain," in the sense that the Uuited States possesses a public domain. It seems to us that the mere statement of these propositions is sufficient to deprive them of all force, and that any attempt at elucidation is more than unnecessary.

Nothing can better demonstrate the fallacy of this contention or more completely disprove the assumption on which the judgment below is based; *i. e.*, the existence of a "national government," in the ordinary sense of that term, or of a "public domain" within and yet distinct from the national government and the public domain of the United States, than the closing chapter of the history of the very leases which are the foundation of the suit at bar.

In February, 1890, President Harrison issued a proclamation as follows:

"Whereas, that portion of the Indian Territory, commonly known as the Cherokee Strip or Outlet, has been for some years in the occupancy of an association or associations of white persons under certain contracts, said to have been made with the Cherokee Nation in the nature of a lease or leases for grazing purposes; and

"Whereas, an opinion has been given to me by the Attorney General, concurring with the opinion given to my predecessor by the late Attorney General, that whatever the right or title of said Cherokee Nation or of the United States to or in said lands may be, no right exists in said Cherokee Nation under the Statutes of the United States to make such leases or grazing contracts, and that such contracts are wholly illegal and void; and

"Whereas, the continued use of said lands thereunder for grazing purposes is prejudicial to the public interests;

"Now, therefore, I, Benjamin Harrison, President of the United States, do hereby proclaim and give notice:

"First. That no cattle or live stock shall hereafter be brought upon said lands for herding or grazing thereon;

"Second. That all cattle and other live stock now on said Outlet must be removed therefrom not later than October 1, 1890, and so much sooner as said lands or any of them may be or become lawfully open to settlement by citizens of the United States; and that all persons connected with said cattle companies or associations must, not later than the time above indicated, depart from said lands."

This proclamation, as stated therein, was based upon the concurrent opinions of two Attorneys General, that no title existed in the said nation to the lands in question, such as to enable the Cherokee Indians to make even leases of these lands that would be legal or binding without the consent of the United States, and pursuant to said proclamation all persons holding cattle on these lands by virtue of such leases were summarily expelled therefrom. It would thus seem that the references to these lands as the "public domain" of the

Cherokee "Nation" was a use of a borrowed term in a play at government, to which the significance attached by the court below is hardly justifiable when it comes to a question of the distribution of more than nine millions of actual money.

Bouvier defines domain to be: "Dominion; territory governed, possession, estate. * * * The right to dispose at pleasure of what belongs to us.

"A distinction has been made between property and domain. The former is said to be that quality which is conceived to be *in* the thing itself, considered as belonging to such or such a person, exclusively of all others. By the latter is understood that right which the owner has *of disposing of the thing*. Hence domain and property are said to be co-relative terms; the one is *the active right to dispose of*, the other a passive quality which follows the thing and places it at the disposition of the owner."

Burrill thus defines domain: "Ownership of land. Immediate or absolute ownership; *paramount or ultimate ownership*. * * * An estate or patrimony which one has in his own right. Land of which one is *the absolute owner*."

Webster defines domain, in its legal sense, as "absolute proprietorship; paramount or sovereign ownership. * * * The territory belonging to a state or general government."

The new Standard Dictionary defines domain to be "a territory or region over which dominion is exercised by a sovereign or other chief authority. * * * Absolute proprietorship in land; *paramount ownership* in an estate."

Thus it will be seen that the very essence of "domain" is the identical thing the Cherokees did *not* possess as to these lands. Such rights, interests and title as they possessed, without attempting to discuss what their nature may have been, were subject to a dominion higher than theirs, and depriving them of all essential at-

tributes as such. As already seen they could not lease, and under the law, they could not sell without the authority and sanction of the United States.

Section 2116 of the Revised Statutes of the United States, provides:

"No purchase, grant, lease or other conveyance of lands or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty," etc.

So it is plain that any analogy sought to be drawn between the landed possessions of these people and the public domain of the United States must be remote and considerably strained as to all considerations of any real consequence in connection with this case.

There is and can be no such analogy between the Cherokee Nation and the United States in respect to the public, national possessions. We cannot imagine such a thing as a sale of our public domain for the purpose of distributing the proceeds pro rata among the "citizens." No such transation was ever dreamed of. But it always has been and is to-day the central idea of the Indian, whether wild, half civilized or civilized. There has hardly been a session of Congress in a century that legislation has not been enacted looking to the purchase of Indian lands or extinguishment of Indian titles and payment, in some form, to the individual members of the tribe or tribes making the cessions. Some payment, *per capita*, is the almost invariable accompanyment of the transaction, down to the present movement, and so

tenacious are they of this idea that without it the effort to negotiate treaties would be a futile undertaking.

But these are not the only errors into which the court below has fallen. It will be noticed that there are two distinct branches or parts to the contract in question; one providing for the purchase of a given quantity of land (157,600 acres) for one consideration, and another providing for the payment to the Cherokee Nation of an amount ($121,824.28) being an amount bearing the same relation to the Cherokee national fund as the number of Delawares to the number of Cherokees.

Singularly, the court below, in one place holds, with us, that no misunderstanding did or could arise out of the first branch of this contract; *i. e.*, as to the purchase of land. In another part of the opinion they declare with equal emphasis that it could not arise out of the latter provision; *i. e.*, with reference to the purpose contemplated by the pro rata payment into the national fund; thus showing that the court below wholly failed to divine the true issue in this case.

The court (page 44) speaking of the land purchase, say (the italics being ours)

"It seems plain to the court that this part of the agreement is for the sale of a specific thing for a specific price. It indeed merely fixes the rate per acre at which land may be purchased, and leaves the Delawares free (within certain restrictions) to take as much or as little as they needed. If they took 50,000 acres they would pay $50,000; if they took 51,000 acres they would pay $51,000. As a matter of fact, they took 157,600 acres, and paid $157,600. The money was the consideration named for the land, and the land the consideration named for the money. The Cherokees as grantors conveyed no right or interest other than in the lands sold, and the Delawares as grantees acquired no right or interest in lands other than those for which they paid."

* * * * * * *

"The agreement expressly excluded the Cherokees from any right of property in the lands of the Delawares, and by implication (in the absence of a provision to the contrary) *excluded the Delawares from any right of property in the lands of the Cherokees.* After it was executed and its covenants performed, there would be two communities in the Cherokee country, and each in the matter of property, so far as the agreement was involved, would be independent of the other."

Again (page 43) speaking of the equalizing payment, they say:

"The agreement accordingly provides that the Delawares shall contribute a porportionate amount and be thereafter jointly and severally and equally interested with the Cherokees *in the augmented fund.* The numbers of the communal owners was fixed or made ascertainable by the agreement, the amount of the primary fund in the treasury was known, the amount to be paid in was a simple matter of calculation, and the result was that the arrangement left the individual interests of the communal owners precisely what they were before, each Delaware and each Cherokee continuing to receive, directly or indirectly, *per capita*, the same dividend that he would have received if the merger of their funds had not taken place. *This part of the agreement has not been susceptible of misconstruction and concerning it no controversy has arisen.*

Now, if both these propositions are true, then there is no controversy. If both these propositions are true, the defendent below, the Cherokee Nation, was entitled to a decree, the two propositions covering every question contended for by us.

But the court proceed:

"There being thus established one communal fund to which all were to contribute eqally, and in which all were equally to share, the agreement further provides for the sale of land in the Cherokee country to the Delawares which should furnish homesteads for these new

inhabitants and future citizens of the Cherokee Nation; and it is this part of the agreement from which the controversy of the case has sprung."

"This part of the agreement" is the same part first above quoted, as being simple, direct and too plain to be misunderstood. But the last above quoted proposition is not only in conflict with the first proposition, if the decree of the court below is to have anything to rest on, but it completely misstates the issue. That is *not* the "part of the agreement from which the controversy of the case has sprung." That is just the part of the agreement over which there could be and is no question of controversy possible. As stated by the court in its first above quoted proposition, this part of the agreement was for the purchase and sale of a "specific thing for a specific price," which was paid, and that was and is the end of it. This controversy has arisen *wholly* out of the other branch of the agreement, which the court say "*has not* been *susceptible of misconstruction!*" As we understand this case, and having been professionally connected with the controversy for years before this suit was brought or authorized to be brought, we think we are pretty well informed concerning it, the whole controversy is as to the extent, reach and character of the "rights and immunities" that passed to the Delawares in consideration of $121,824.28 paid into the general (national) fund of the Cherokees. Was this payment for equal enjoyment of Cherokee citizenship, schools, charities and public institutions, or was it to also purchase an interest in the immense unoccupied territory of the latter? If it was intended as such property purchase, why was it not named in a sum large enough to pay at least *some part*, even though comparatively small, of the value of those lands, instead of the *exact amount* by which the in-

coming Delawares would increase the current, running expenses of the Cherokee public establishment?

We contend here, and contended in the court below, exactly as the court state, that "this part of the agreement has not been susceptible of misconstruction," and as there never has been any controversy over the other part of the contract, and no way, apparently, in which one could possibly arise, we are not quite clear as to what the court below founded its decree upon.

Again, we are not altogether clear as to how much force the court below give to the communal character of the Cherokee holding. At one time they say: "The primitive control of the uses to be made of the land has passed from the communal owners and become lodged in the State," etc., and yet they argue continually on the communal character of the title, stating that "the legislation of the Cherokees recognizes again and again the communal character of the seizin or occupancy of the land." We do not regard this inquiry as at all essential to a proper and just determination of the present controversy. It is certain that the Cherokee Nation, so called, possessed, at the time the contract in question was entered into, a vast territory, which it held as a political body or as a community, and of which it was guaranteed the peaceful possession by our government; that it was the policy of our government to encourage settlement among these people of friendly Indians, of whites and others, and that these affiliated persons or bodies should have the benefit of citizenship and all civil rights, unimpaired. We do not believe it was *ever* in contemplation by our government, by the Cherokees or by their adopted citizens, that by permitting this privilege the Cherokees were parting with "the heritage of their fathers and the patrimony of their children." Such a proposition is repugnant to

every sentiment of fair dealing and not in accordance with the usual methods of buisness transactions. There is no reason why the Cherokees could not permit the residence of foreigners among them, with all political rights and benefits, without giving them of their lands and possessions. The Cherokee Nation to-day has a larger population of adopted whites than of Delawares. These adopted whites were made "citizens" by the same amendment to the constitntion that the Delawares were. They vote, hold office, enjoy the schools and public institutions, but not one has ever had the temerity to claim an interest in the unoccupied lands of the nation, and the government has never treated them as having any vestige of claim thereto. These people have just as good a claim as the Delawares and Shawnees, and if the judgment of the court below is to stand, then the Delawares and Shawnees will take too much by the decree, as the funds belong not to the Cherokees, Delawares and Shawnees alone, but to the negroes and adopted whites as well—in short, to the whole Cherokee citizenship—no matter what its character.

It is certain that there was no *community* of title or interest between these peoples, except as to public *administration* and police control. The ownership of the Delawares in their 157,600 acres was *exclusive.* Their use and benefit of nearly a million dollars of their own invested funds were exclusive. What is there in this that hints at a community of material interest?

The court below say:

"Nevertheless, after all due allowances have been made, it is apparent that the Delawares retained their separate national fund of $889,191 in the treasury of the United States as their separate property; and that the property of the Cherokees vastly exceeded that which they contributed to the communal estate and the

consideration which they paid for a foothold in the Cherokee country."

* * * * * * *

"The Delawares, when they entered into the agreement, had no right to expect that the land of the Cherokees would be sold and that they would be admitted to share in the proceeds by virtue of either their *purchase* or their *citizenship*. They cannot now say that they were induced to enter into the agreement on the faith of any such expectation."

It certainly cannot be held that they will be permitted to realize from this unexpected source without first complying with the requirement of the second subdivision of the fifteenth article of the treaty of 1866, by paying into the Cherokee National fund an amount equal to the probable proceeds of the "lands herein authorized to be ceded or sold;" *i. e.*, the strip lands, and these same lands west of 96°. We do not understand that courts of equity favor the taking of the property of one and giving it to another, without compensation. We do not understand that the courts even look kindly upon contracts which clearly intend such a transaction. We even understand that courts will disfavor contracts that do not stand on fair and just considerations, and where there is any doubt or room for interpretation, will so construe them as to make them mean that which is fair and just. The application of such rules to this case is all we ask. The appellee is not asking a decree founded upon justice. He asks for a strict construction of his contract—of its *letter*. He wants "the due and forfeit of his bond." The court below admit the injustice that is worked by the interpretation they put upon this instrument, and apologise for it through every line of their opinion!

We agree with the court below, that the language of the law of the Cherokee Nation allowing citizenship by intermarriage is significant:

"*Provided, also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation, unles such adopted citizen shall pay into the general fund of the national treasury a sum of money to be ascertained and fixed by the National Council equal to the "pro rata" share of each native Cherokee, in the lands and vested wealth of the nation, estimated at five hundred dollars."

Here we have an affirmative declaration of two things very important in this connection. First, that there are *citizens* of the Cherokee Nation *whose rights and privileges are limited and abridged.* In other words, who are *equal* with native Cherokees in all respects, *except property rights.* If the proposition of the court below were true, that the Cherokee "citizen" stands in the same light to the Cherokee Nation that a "citizen" of the United States does to our government, were true, then this condition of *limited* or restricted citizenship could not exist, for no such anamalous relationship can exist with us. Second, it is a direct statement of the *per capita* value placed by the Cherokee Nation upon its "lands and vested wealth." This is a wholly disinterested witness. This value was fixed without any thought of any bearing it might ever have upon the Delaware-Shawnee question, for their unreasonable claim had at that time never been suggested or thought of, and was not for years after this law had been enacted. Now to pay for a share in the "lands and vested wealth" of the Cherokees, for 985 Delawares on this basis, would have required $492,500.00. They actually paid for the "rights and immunities * * * as native Cherokees" $121,824.28! which was exactly the right proportion for an interest in the "lands and wealth" of the Cherokees, *except* the strip lands and lands lying west of the 96°, which others, who were to participate therein, were compelled to pay for. Thus it will be seen

that every step in the history of these people, every circumstance of their relation with the outside world, every utterance past or present that can be invoked as a witness is in confirmation of the theory of the meaning of this contract that the circumstances surrounding the making of it, and the equities of the situation import.

The mere fact that the Delawares and Shawnees came into the Cherokee country under the formality of a contract, does not carry with it any force beyond the terms thereof. They could not have a foothold in this country without a contract and a price. The treaties between the Cherokees and the United States guarantee to these people protection from intrusion upon their lands without their consent. No white man, no Negro, no Indian could acquire a settlement, except by an arrangement with them. They have provided generally for the admission of certain persons by intermarriage, and others by adoption, and as to them they have provided *limitations* upon their rights and privileges as Cherokee "citizens," except upon certain conditions, to wit: the payment of an amount equal to the *per capita* wealth of the Cherokees, on a conservative estimate, showing the indisposition of these shrewd people to permit a gradual reduction and perhaps final dissipation of individual, *per capita* wealth among them which would otherwise occur.

If the position of the appellees can be maintained, then they can claim a pro rata interest in the home reservation (about 5,000,000 acres) within which they have purchased and are the absolute owners of 157,600, and of which, as in the case of the "Strip" and "Outlet" lands, no account was taken in the agreement between the the parties as a basis of contribution by the Delawares, and in case of allotment in severalty or sale of the lands they would not only be entitled to the 160

acres per head already owned by them, but also a pro rata share in this vast tract of land, and would in the end take a much larger distributive share than the native Cherokee would have out of his patrimony.

In Conclusion.

Our contentions in this case are:

First. That under article four of the Delaware treaty of July 4th, 1866 (14th, Stat., 794) the amount of land to be purchased for that tribe was limited to 160 acres to each man, woman and child.

Second. That under the fifteenth article of the Cherokee treaty of July 19th, 1866 (Id. 803) it was agreed that the United States might settle friendly Indians in the Chorokee country, east of the 96° upon terms to be agreed upon by the parties, subject to the approval of the President of the United States.

Third. That by that article two plans were provided by which Indians might be settled in the Cherokee country: (*a*) where they abandon their tribal relations and (*b*) where they preserved their tribal organization.

Fourth. That those abandoning their tribal relations were to pay into the Cherokee national treasury a sum of money bearing the same relation to the then existing national fund that their numbers bore to the whole number of Cherokees, as their proportionate contribution toward the increased expenses of the government incident to their citizenship, and they were thereby to become entitled to share in all the benefits of that government, including civil and political rights and immunities, and the right to occupy and use lands within the home reservation the same as native Cherokees; but that they were not, by reason of such payment, to be entitled to any share in any of the lands belonging to the Cherokee Nation.

Fifth. The Indians electing to preserve their tribal organization were to have set apart to them an amount of land equal to 160 acres for each man, woman and child, and were to pay into the Cherokee national fund a sum of money in the proportion to the existing national fund and *the probable proceeds of the strip lands in Kansas, and the lands west of the 96°*, that their number bore to the number of Cherokees.

Sixth. That the Delaware Indians elected to maintain their tribal organization and have so maintained it to the present time.

Seventh. That the lands ceded by that treaty are those described in the seventeenth article thereof, and known as the "Neutral lands," about 800,000 acres and the "Strip lands," about 400,000 acres, and the lands authorized to be ceded and sold are those lying west of the 96° known as the "Outlet lands," and containing about 8,000,000 acres.

Eighth. That by the agreement between the Cherokees and Delawares, it was provided (to the end that there might be no mistake thereafter as to the amount to be contributed to the Cherokee national fund by the Delawares) that the whole amount of the invested funds of the Cherokees was $678,000.00, to which there was to be added the sum of $1,000,000.00, being the estimated value of the Cherokee Neutral lands in Kansas; thus making the whole Cherokee national fund $1,678,000.00, which was to be taken as the basis for calculating the amount which the Delawares were to pay into the common fund, and the Delawares made payment in accordance therewith.

Ninth. That the Delawares did not then and have not since paid into the Cherokee national fund a proportion equal to the probable proceeds of the "Strip lands" (about 400,000 acres) ceded, by said treaty, or the "Outlet lands" (about 8,000,000 acres) authorized to be ceded or

sold, or any part thereof as required by the second subdivision of article fifteen of the Cherokee treaty.

Tenth. That under the fourth article of the Delaware treaty and the fifteenth article of the Cherokee treaty the Delawares (maintaining their tribal organization) purchased 157,600 acres of land from the Cherokees, being 160 acres for each man, woman and child, and paid therefor $157,600.00.

Eleventh. That the Delawares retained a separate national fund of $889,191 in the United States Treasury as their separate property which has lately been paid out *per capita* to Delawares only. (26 Stat., 1011; 27 Stat., 617.)

Twelfth. That the Cherokee national fund, since the the date of the agreement with the Delawares, has been vastly augmuented and now amounts to $2,636,634 in the proceeds of which the Delawares have participated, contributing nothing thereto as required by the second subdivision of article fifteen of the Cherokee treaty of 1866.

Thirteenth. That the Cherokee Nation has always had, and has to-day, several classes or degrees of citizenship, unlike anything known to our form of government, a large proportion of its citizens having no interest in the "lands or vested wealth" of the nation.

Fourteenth. That the relation of the Cherokee to his unoccupied land is wholly different from that of the citizen of the United States toward our public domain. It is *sui generis*, and without an analogy anywhere. These lands have always been regarded as property in which each individual had a separate, personal interest. Not such that he could demand a partition, but such that when the whole should be sold, each would receive his part. It was a modified, joint tenancy—a nondescript—but as to which the purpose and intent of the owners is clear and unmistakable.

Fifteenth. That the "rights and immunities" which were intended by the Cherokees to be conferred, and intended by the Delawares to be received and enjoyed, were the rights and immunities of citizenship and good government, paid for and maintained by the interest arising from the national (invested) fund, and nothing more.

Sixteenth. That there was no "mutuality" between the Cherokees, Delawares and Shawnees, except as to current expenses of the government, and that even as to this, both the Delawares and Shawnees failed to sustain their part; that as to tribal wealth, or resources the Delawares and Cherokees each retained something from the common till—the Delawares about $900,000.00 in money (since paid to them *per capita*); the Cherokees the home reservation, strip lands and lands west of the 96°; the Shawnees nothing, because they had nothing.

CHARLES A. MAXWELL,
GEORGE S. CHASE,
Solicitors for Appellants.

IN THE

Supreme Court of the United States.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

v.

CHARLES JOURNEYCAKE, PRINCIPAL CHIEF OF THE DELAWARE INDIANS, APPELLEE.

No. 619.

STATEMENT OF THE CASE.

The Cherokee Nation of Indians took part with the Confederate forces during the late War of the Rebellion. After the war, July 19, 1866, the Government made a treaty with them, in which it was provided, among other things, in Article 9, that the Indians should liberate their slaves and give the freedmen and the free colored persons who were in the Cherokee country at the commencement of the rebellion and still resided there, or who should return there within six months, and their descendants, "all "the rights of native Cherokees."

In another Article (15) of this treaty it was further agreed that the United States might settle any civilized Indians, friendly with the Cherokees and adjacent tribes,

within the Cherokee country, on unoccupied lands east of 96°, on terms therein prescribed, and when the required conditions were fulfilled the Indians thus settled among the Cherokees were to "enjoy all the rights of native Cherokees."

After making this treaty the Cherokee Nation, November 26, 1866, changed its written constitution to make it correspond with the requirements of the above treaty in respect (1) to the ownership of the national public domain, (2) as to who constituted the citizens of the Nation.

In pursuance of the said treaty of 1866 with the United States, and the changes thus made in their constitution, the Cherokees, on the 8th of April, 1867, entered into an agreement with the Delaware tribe of Indians wherein it was stipulated that upon the fulfilment of the conditions therein imposed upon said Delawares they were to settle among the Cherokees and to become members of the Cherokee Nation, with the same rights and immunities as native Cherokees, and their children were to be regarded as native Cherokees. A similar agreement was subsequently made between the Shawnees and Cherokees.

In the "agreed facts" filed in this case it is alleged "That the Delaware Indians removed to the Cherokee "country, and have ever since resided there, *and have in* "*every respect fully complied with the agreement on their* "*part.*"

The record also discloses that from the time when the Delawares settled in the Cherokee country and became citizens of the Cherokee Nation, under the terms of said agreement of April 8, 1867, up to the year 1883 they were accorded all the rights of citizenship which were accorded to Cherokees of blood. They shared as other citizens in the general fund, had their full share in the distribution of other funds, in the enjoyment of the public schools, asylums,

and other public institutions of the Nation, including the exercise of the suffrage and holding office.

By an Act of Congress, approved March 3, 1875 (18th Stats. 451), there was paid over to the Cherokee Nation $200,000, being a part of the proceeds of lands lying west of 96° sold to the Osage Indians. This sum was duly distributed *per capita* to all the Cherokee citizens, including the Delawares. By another Act of Congress, approved June 16, 1880, there was appropriated, and paid to the Cherokees, from the same fund the further sum of $300,000. This was also distributed *per capita*, the Delawares getting their proper proportion.

By the Sundry Civil Appropriation Act approved March 3, 1883, Congress appropriated $300,000, out of the funds due the Cherokees under the appraisement of their lands west of the Arkansas River, which was to be paid into the Cherokee treasury and be expended under acts of the National Council. In May of that year the National Council passed an Act providing for the distribution of this sum to the Cherokees *by blood* (Appendix, p. xviii). Their Principal Chief, D. W. Bushyhead, vetoed this bill, and the Council passed it by the required two-thirds majority over the veto (Appendix, p. xviii). Accordingly, the said sum of $300,000 was paid out *per capita* to the Cherokees *by blood*, excluding the Delawares, Shawnees, and freedmen (Act of Congress, October 19, 1888, 25 Stats. 608).

The plaintiffs in this case, the Delawares, joining with the Shawnees and freedmen, petitioned Congress for relief from the acts of the Cherokees in excluding them from sharing in the said sum of $300,000 so appropriated by the Act of March 3, 1883, and on the 19th of October, 1888, the President approved the Act entitled "An Act to secure "the Cherokee freedmen and others their proportion of "certain proceeds of land under the Act of March 3,

"1883" (25 Stats. 608). This Act declares that the freedmen, Delawares, and Shawnees were deprived of their legal and just dues by the distribution of the $300,000 to Cherokees of blood, as above set forth, and appropriates $75,000 to be distributed among them in such amounts as will equalize the *per capita* payments theretofore made to the Cherokees *by blood*, and directs that the amount so expended "shall be charged against the Cherokee Nation, "on account of its lands west of the Arkansas River, and "shall be a lien on said lands, and which shall be deducted "from any payments hereafter made on account of said "lands."

On the 19th of May, 1883, the Cherokees, by an Act of their National Council, authorized their Principal Chief to lease, for grazing purposes, all of their unoccupied lands west of 96° for the term of five years at an annual rental of $100,000. On the 5th of July of the same year the lease was duly made, and was subsequently renewed at an increased rental (Laws and joint resolutions of the Cherokee Nation, 1881–'2–'3, pp. 142 to 146).

In 1889 there had been collected on these leases the sum of $843,750 (Rec. 22). From this so-called *lease money* there was paid out by the Treasurer of the Nation, to Cherokees *by blood* only, in 1886, $295,000, $2,611.25, and $111.65, and in 1890, $298,625; the expenses of taking the census and making these payments being, in 1886, $5,000 and in 1890, $1,375. This makes a total, paid to or on behalf of the Cherokees *by blood* from the lease money, of $602,722.90.

The Delawares, Shawnees, and freedmen claimed their proportionate share in this last sum. Congress, by an Act approved October 1, 1890, referred the matter to the Court of Claims, authorizing the several claimants to bring suit (26 Stats. 636). The plaintiffs filed their petition October

29, 1890, and on April 24, 1893, the court rendered a decree in their favor for $17,011, from which the defendants have appealed to this court.

The Delawares claim that by reason of their agreement with the Cherokees they are entitled to all the rights and immunities of native Cherokees, including an equal ownership in the Cherokee national domain.

This contention of the appellees was sustained by the court below. In a general way it is the only point in the case. It depends for decision upon the construction given the said agreement. But the agreement, which was executed by the Cherokees and Delawares on the 8th day of April, 1867, must be construed in connection with the Cherokee treaty of August 11, 1866, and the amendments to the Cherokee constitution which followed that treaty. In a large sense these are all *in pari materia*.

Taking these essential documents in their chronological order, we first call attention to Article 15 of the treaty. It reads as follows:

"Article XV. The United States may settle any civilized "Indians friendly with the Cherokees and adjacent tribes "within the Cherokee country on unoccupied lands east of "96°, on such terms as may be agreed upon by any such "tribe and the Cherokees, subject to the approval of the "President of the United States, which shall be consistent "with the following provisions, viz: Should any tribe or "band of Indians settling in said country abandon their "tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the "same proportion to the then existing national fund that "the number of Indians sustain to the whole number of "Cherokees then residing in the Cherokee country, they "shall be incorporated into and ever after remain a part of "the Cherokee Nation on equal terms in every respect with "native citizens; and should any such tribe thus settling

" in said country decide to preserve their tribal organiza-
" tions and to maintain their tribal laws, customs, and
" usages, not inconsistent with the constitution and laws of
" the Cherokee Nation, they shall have a district of country
" set off for their use by metes and bounds equal to one
" hundred and sixty acres, if they should so decide, for
" each man, woman, and child of said tribe, and shall pay
" for the same into the national fund such price as may be
" agreed upon by them and the Cherokee Nation, subject
" to the approval of the President of the United States,
" and in cases of disagreement the price to be fixed by the
" President.

" And the said tribe thus settled shall also pay into the
" national fund a sum of money, to be agreed on by the
" respective parties, not greater in proportion to the whole
" existing national fund and the probable proceeds of the
" land herein ceded or authorized to be ceded or sold than
" their numbers bear to the whole number of Cherokees
" then residing in said country, and thence afterwards they
" shall enjoy all the rights of native Cherokees; but no
" Indians who have no tribal organizations or who shall
" determine to abandon their tribal organizations shall be
" permitted to settle east of the 96° of longitude without
" the consent of the Cherokee National Council or of a
" delegation duly appointed by it being first obtained; and
" no Indians who have and determine to preserve their
" tribal organizations shall be permitted to settle, as herein
" provided, east of the 96° of longitude without such con-
" sent being first obtained, unless the President of the
" United States, after a full hearing of the objections
" offered by said council or delegation to such settlement,
" shall determine that the objections are insufficient, in
" which case he may authorize the settlement of such tribe
" east of the 96° of longitude."

Revised Indian Treaties, 85.

It will be seen that this article provides, first, for the settlement of other Indians on the unoccupied lands of the Cherokees lying east of 96°. The terms on which such settlements can be made are specifically laid down. 1st. Pro-

vision is made for the settlement of tribes that are willing to abandon their tribal organization and be absorbed into the Cherokee Nation. 2d. Provides for the settlement of tribes who desire to maintain their tribal organizations, laws, customs, and usages.

Of the first class all that is required is that they shall pay into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing fund that their numbers sustain to the number of Cherokees then residing in the Cherokee country, thereupon "they shall be "incorporated into and ever after remain a part of the "Cherokee Nation, on equal terms in every respect with "native citizens."

Of the second class, those who were to maintain their tribal organizations, much more was required. 1st. They were to pay for the land they should occupy. The price was to be fixed by the Indians themselves, or, in case they disagreed, then by the President. The money for the land was to be paid into the national fund. The land for their occupancy was to be set off by metes and bounds, and aggregate 160 acres for each man, woman, and child. In addition to having to pay for the land, the tribe was also required to pay into the national fund a sum of money "not "greater in proportion to the whole existing national fund "and the probable proceeds of the lands herein ceded or "authorized to be ceded or sold than their numbers bear to "the whole number of Cherokees then residing in said "country, *and thence afterwards they shall enjoy all the "rights of native Cherokees.*"

Then, in the latter part of the article, it is provided that neither of these classes of Indians shall be settled upon said Cherokee lands east of the 96° of longitude without the consent of the Cherokee National Council, or of a delegation duly appointed by it, being first obtained, except in

case of tribes desiring to preserve their tribal organizations the President might, after a full hearing, overrule any objections of the Cherokees and authorize the settlement.

From this analysis of Art. 15 it is seen that the Cherokees were willing to have other *individual* Indians incorporated into their Nation on equal terms in every respect with native citizens, simply on the payment into the national fund of a sum of money which should bear the same proportion to the amount of the then existing fund as the numbers thus incorporated bore to the whole number of Cherokees. In such case the new-comers were not to pay anything for the land they would occupy. They were expected to be distributed about among the citizens holding possession of such lands as they chanced to settle upon in the same way and upon the same terms as the Cherokees *by blood* held.

But where tribes were to be settled *as tribes*, and could have small reserves, as it were, set off to them by metes and bounds, the Cherokees were not willing they should be admitted to the full rights of citizenship without greater proportionate payment. These settling tribes were therefore required to pay into the national fund not only a sum which would be a proper proportion of the fund then existing (as was required of individuals or disbanding tribes who might settle), but to the then existing national fund was to be added the probable proceeds of certain lands which had been ceded or sold by the Cherokees and not yet paid for, and the incoming tribe was to pay in proportion to a fund thus enlarged. And in addition to this the incoming tribe was to pay for the lands its members should occupy.

Changes of the Constitution.

The terms of the treaty providing for a class of Cherokee citizens who were not native Cherokees necessitated

changes in their constitution. The constitution adopted in 1839, which was then in force, defined who were the owners of the lands of the Cherokee Nation, and limited citizenship to descendants of native Cherokees. Section 2 of Article 1 provided as follows:

"SEC. 2. The lands of the Cherokee Nation shall remain "common property; but the improvements made thereon, "and in the possession of the citizens of the Nation, are "the exclusive and indefeasible property of the citizens "respectively who made, or may rightfully be in possession "of them: *Provided*, That the citizens of the Nation "possessing exclusive and indefeasible right to their im- "provements, as expressed in this article, shall possess no "right or power to dispose of their improvements, in any "manner whatever, to the United States, individual states, "or to individual citizens thereof; and that, whenever any "citizen shall remove with his effects out of the limits of "this Nation, and become a citizen of any other govern- "ment, all his rights and privileges as a citizen of this "Nation shall cease; *Provided*, *nevertheless*, That the "National Council shall have power to readmit, by law, to "all the rights of citizenship, any such person or persons "who may, at any time, desire to return to the Nation, on "memorializing the National Council for such readmission."

Section 5 of Article 3, prescribing who are citizens, was in these words:

"SEC. 5. No person shall be eligible to a seat in the "National Council but a free Cherokee male citizen, who "shall have attained to the age of twenty-five years.

"The descendants of Cherokee men by all free women, "except the African race, whose parents may have been "living together as man and wife, according to the customs "and laws of this Nation, shall be entitled to all the rights "and privileges of this Nation as well as the posterity of "Cherokee women by all free men. No person who is of "negro or mulatto parentage, either by the father's or the

" mother's side, shall be eligible to hold any office of profit,
" honor or trust, under this government."

Const. and Laws, Cherokee Nation, ed. of 1892, pp. 11, 12 and 14.

Immediately following the treaty, the Nation amended these sections, first adopting the following preamble :

" Whereas, by the treaty executed at Washington, on the
" 19th day of July, A. D. 1866, between the United States
" and the Cherokee Nation, through its delegation, ratified
" by the Senate and officially promulgated by the President
" of the United States, August 11, 1866, certain things were
" agreed to between the parties to said treaty, involving
" changes in the Constitution of the Cherokee Nation, which
" changes cannot be accomplished by the usual mode, and—
" Whereas, it is the desire of the people and government
" of the Cherokee Nation, to carry out in good faith all of
" its obligations, to the end that law and order may be pre-
" served, and the institutions of their government main-
" tained."

After this came the new sections, in lieu of Section 2 of Article 1, and Section 5 of Article 3, as follows:

" Sec. 2. The lands of the Cherokee Nation shall remain
" common property until the National Council shall request
" the survey and allotment of the same, in accordance with
" the provisions of Article 20th of the treaty of 19th of
" July, 1866, between the United States and the Cherokee
" Nation."

" Sec. 5. No person shall be eligible to a seat in the
" National Council but a male citizen of the Cherokee Na-
" tion, who shall have attained to the age of twenty-five
" years, and who shall have been a *bona fide* resident of
" the district in which he may be elected, at least six months
" immediately preceding such election. *All native-born*
" *Cherokees, all Indians, and whites legally members of the*
" *Nation by adoption, and all freedmen who have been*
" *liberated by voluntary act of their former owners or by*

" *law, as well as free colored persons who were in the coun-*
" *try at the commencement of the rebellion, and are now resi-*
" *dents therein, or who may return within six months from*
" *the 19th day of July, 1866, and their descendants, who*
" *reside within the limits of the Cherokee Nation, shall be*
" *taken, and deemed to be, citizens of the Cherokee Nation.*"
Constitution and Laws, Cherokee Nation, ed. 1892, pp. 31, 32 and 33.

The Cherokee and Delaware Agreement.

Now, in pursuance of this treaty, and this amended constitution, the Cherokees and Delawares came together the following year (1867) and made the contract in question. The Delawares lived in Kansas. They were well advanced in civilization. Charles Journeycake, a man of ability and sagacity and probity, was their Chief. They had a general fund in the treasury of the United States of $1,442,667.99. Nearly $500,000 of this amount was designated as a school fund. Under the terms of the 15th article of the treaty of 1866, it would not require all of their money to establish themselves in the Cherokee country as Cherokee citizens. As a considerable fund would remain to be administered and finally disposed of for their individual benefit, they chose to preserve their tribal organization as the treaty permitted. And accordingly they entered into the following contract with the Cherokees:

" Articles of agreement made this 8th day of April, A. D.
" 1867, between the Cherokee Nation, represented by
" William P. Ross, Principal Chief; Riley Keyes, and
" Jesse Bushyhead, delegates duly authorized, parties of
" the first part, and the Delaware tribe of Indians, repre-
" sented by John Connor, Principal Chief; Charles Jour-
" neycake, Assistant Chief; Isaac Journeycake and John
" Sarcoxie, delegates for and on behalf of said Delaware
" tribe, duly authorized, witnesseth:

"Whereas by the fifteenth article of a certain treaty between the United States and the Cherokee Nation, ratified August 11, 1866, certain terms were provided, under which friendly Indians might be settled upon unoccupied lands in the Cherokee country east of the line of 96° of west longitude, the price to be paid for such lands to be agreed on by the Indians to be thus located and the Cherokee Nation, subject to the approval of the President of the United States; and whereas by a treaty between the United States and the Delaware tribe of Indians, ratified August 10, 1866, the removal of the said Delawares to the Indian country south of Kansas was provided for; and, in the fourth article whereof, an agreement was made by the United States to sell to the Delawares a tract of land, being part of a tract, the cession of which by the Cherokees to the United States was then contemplated; and whereas no such cession of land was made by the Cherokees to the United States, but, in lieu thereof, terms were provided, as hereinbefore mentioned, under which friendly Indians might be settled upon their lands; and whereas a full and free conference has been had between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee Nation:

"Now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

"The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfilment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to one hundred and sixty acres for each individual of the Delaware tribe, who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elect to remove to the 'Indian country,' to which list may be added, only with the consent of the Delaware council, the names of such other Delawares

" as may, within one month after the signing of this agree-
" ment, desire to be added thereto, and the selections of
" the lands to be purchased by the Delawares may be made
" by said Delawares in any part of the Cherokee Reserva-
" tion east of said line of 96°, not already selected and in
" possession of other parties, and in case the Cherokee
" lands shall hereafter be allotted among the members of
" said nation, it is agreed that the aggregate amount of
" land herein provided for the Delawares, to include their
" improvements according to the legal subdivisions when
" surveys are made (that is to say, one hundred and sixty
" acres for each individual), shall be guaranteed to each
" Delaware incorporated by these articles into the Chero-
" kee Nation, nor shall the continued ownership and occu-
" pancy of said land by any Delaware so registered be in-
" terfered with in any manner whatever without his con-
" sent, but shall be subject to the same conditions and re-
" strictions as are by the laws of the Cherokee Nation im-
" posed upon native citizens thereof.

" Provided that nothing herein shall confer the right
" to alienate, convey, or dispose of any such lands,
" except in accordance with the constitution and laws of
" said Cherokee Nation.

" And the said Delawares, parties of the second part,
" agree that there shall be paid to the said Cherokees from
" the Delaware funds now held or hereafter received by
" the United States, a sum of money equal to one dollar
" per acre for the whole amount of one hundred and sixty
" acres of land for every individual Delaware who has
" already been registered upon the aforesaid list, made Feb-
" ruary 18, 1867, with the additions thereto heretofore pro-
" vided for.

" And the Secretary of the Interior is authorized and re-
" quested to sell any United States stocks belonging to the
" Delawares to procure funds necessary to pay for said
" lands; but in case he shall not feel authorized, under ex-
" isting treaties, to sell such bonds belonging to the Dela-
" wares, it is agreed that he may transfer such United
" States bonds to the Cherokee Nation, at their market
" value, at the date of such transfer.

"And the said Delawares further agree, that there shall "be paid from their funds now or hereafter to come into "possession of the United States, a sum of money which "shall sustain the same proportion to the existing Chero- "kee national fund that the number of Delawares regis- "tered as above mentioned and removing to the Indian "country sustains to the whole number of Cherokees re- "siding in the Cherokee Nation. And for the purpose of "ascertaining such relative numbers, the registers of the "Delawares herein referred to, with such additions as may "be made within one month from the signing of this agree- "ment, shall be the basis of calculation as to the Dela- "wares, and an accurate census of the Cherokees residing "in the Cherokee Nation shall be taken under the laws of "that nation within four months, and properly certified "copies thereof filed in the Office of Indian Affairs, which "shall be the basis of calculation as to the Cherokees.

"And that there may be no doubt hereafter as to the "amount to be contributed to the Cherokee national fund "by the Delawares, it is hereby agreed by the parties "hereto that the whole amount of the invested funds of "the Cherokees, after deducting all just claims thereon, is "$678,000.

"And the Delawares further agree, that in calculating "the total amount of said national fund there shall be "added to the said sum of $678,000 the sum of $1,000,000, "being the estimated value of the Cherokee neutral lands "in Kansas, thus making the whole Cherokee national "fund $1,678,000; and this last-mentioned sum shall be "taken as the basis for calculating the amount which the "Delawares are to pay into the common fund.

"Provided, that as the $678,000 of funds now on hand "belonging to the Cherokees is chiefly composed of stocks "of different values, the Secretary of the Interior may "transfer from the Delawares to the Cherokees a proper "proportion of the stocks now owned by the Delawares of "like grade and value, which transfer shall be in part of "the pro rata contribution herein provided for by the Del- "awares to the funds of the Cherokee Nation; but the "balance of the pro rata contribution by the Delawares to

" said fund shall be in cash or United States bonds, at their " market value.

" All cash, and all proceeds of stocks, whenever the same " may fall due or be sold, received by the Cherokees from " the Delawares under the agreement, shall be invested " and applied in accordance with the 23d article of the " treaty with the Cherokees of August 11, 1866.

" On the fulfilment by the Delawares of the foregoing " stipulations, all the members of the tribe registered as " above provided, shall become members of the Chero- " kee Nation, with the same rights and immunities, and " the same participation (and no other) in the national " funds as native Cherokees, save as hereinbefore pro- " vided.

" And the children hereafter born of such Delawares so " incorporated into the Cherokee Nation, shall in all re- " spects be regarded as native Cherokees.

" WILL P. ROSS,
" *Principal Chief.*
" RILEY KEYES,
" *Cherokee Delegation.*
" JOHN his + mark. CONNOR,
" *Principal Chief.*
" CHARLES JOURNEYCAKE,
" ISAAC JOURNEYCAKE,
" JOHN his + mark. SARCOXIE,
" *Delaware Delegation.*

" Executed and delivered in our possession by the above- " named delegates of the Cherokee and Delaware nations, " at the city of Washington, in the District of Columbia, " the day and year first above written.

" JOHN G. PRATT.
" W. A. PHILLIPS,
" EDWARD S. MENAGETH.

"DEPARTMENT OF THE INTERIOR,
"*April* 11, 1867.

"The within agreement between the Cherokee and Del-
" aware tribes of Indians, concluded on the 8th instant, and
" providing for uniting the two tribes as contemplated by
" the Cherokee treaty of July 19, 1866, is respectfully sub-
" mitted to the President, with the recommendation that it
" be approved.

"O. H. BROWNING,
"*Secretary.*

"Approved April 11, 1867.
"ANDREW JOHNSON."

The construction given by the court to the two last clauses of this contract must determine the case. If, in view of the 15th Article of the treaty, which is really made a part of the agreement, and of the amendments to the Cherokee constitution, the words "shall become members " of the Cherokee Nation, with the same rights and im-
" munities, and the same participation (and no other) in the
" national funds, as native Cherokees, save as hereinbefore
" provided. And the children hereafter born of such
" Delawares so incorporated into the Cherokee Nation,
" shall in all respects be regarded as native Cherokees,"—if these words can be construed to confer only a limited citizenship, a citizenship of less value than that of the natives, then our contention fails.

The force and effect of the terms of this agreement should depend upon the intention of the parties at the time it was executed. The history of the relations of the two tribes from that date up to 1883 is a continual interpretation of the most conclusive character.

CONSTRUCTION OF THE AGREEMENT GIVEN BY THE PARTIES.

By the treaty of 1866 the Cherokees ceded to the United States two specific tracts, known, respectively, as the

"neutral lands" and "the Strip." These lands were to be surveyed and sold by the Government, and the net proceeds turned over to the Cherokees. The neutral lands contained 800,000 acres, and the Strip 400,000 acres. When the Cherokees came to contract with the Delawares the net proceeds from the neutral lands were estimated at $1,000,000, for the purpose of fixing the amount of the Cherokee national fund as a basis upon which the Delawares were to pay. Nothing was said in the contract as to the disposition of the proceeds to be received from the sale of the 400,000 acres in the Strip. The record shows that all the money from this source was shared by the Delawares.

The treaty also provided for the cession to the United States, from time to time, of tracts in the Outlet for the settlement of friendly Indians, which tracts were to be paid for by the United States. Such cessions were made for reservations for the Osages, Pawnees, Otoes, Poncas, Tonkawas, and Kansas, and large sums in payment of the same turned into the Cherokee national fund or into their home treasury. In all this money the Delawares shared without question. The money was used for the common good. But it was, nevertheless, money derived from that part of the Cherokee public domain not specifically mentioned in the agreement with the Delawares. In a word, it was money in which the appellants now claim the Delawares were not entitled to share.

But this agreement of 1867 was made while the terms of the treaty of 1866 were fresh in the minds of the contracting parties. In that treaty the Cherokees had solemnly stipulated (Art. 23) that the funds to accrue from the sale of their lands, including the Outlet, should be used for the common good of the Cherokee Nation. Thirty-five per cent. was to be applied to the support of schools, fifteen per cent. for the orphan fund, and fifty per cent. for gen-

eral purposes, including reasonable salaries of district officers. And by Articles 9 and 15 it was stipulated that thereafter the Cherokee Nation should consist of native Cherokees, freedmen, and such friendly Indians as should be incorporated according to their provisions. This furnishes the explanation why no objection was made at that time to the Delawares sharing in the proceeds of the Outlet.

On the 19th of November, 1874, the Cherokee Council passed an Act entitled "An Act providing for breadstuffs for "the Cherokee People."

Appendix, p. xiv.

This law instructs the Cherokee delegation at Washington to negotiate a loan with the United States for $500,000, to be refunded out of the proceeds of the Outlet lands and the money distributed to the "whole Cherokee people" to enable them to purchase breadstuffs. It further directs the Principal Chief, upon the receipt of these funds, to pay them out "*per capita* to the whole Cherokee people," &c.

March 3, 1875, in response to this enactment of the Cherokees, Congress appropriated $200,000, "to be dis-"tributed among said Cherokee Indians, as provided by "Act of the Cherokee Council of November 19, 1874," but upon the condition that a certified copy of said Act of the Cherokee Council should be filed in the office of the Secretary of the Interior.

18 Stat. 451.

This $200,000 the Cherokees did distribute *per capita* to all citizens, including the Delawares. Thus the Council and executive officers of the Nation gave construction to what was meant by the phrase "the whole Cherokee peo-"ple." It included the Delawares, Shawnees, and freedmen.

Again, in 1879, the Cherokee Council instructed their Washington delegation to ask a loan of the United States of $500,000, to be paid out to the "Cherokee people *per* "*capita*," and the amount to be refunded to the United States from the proceeds of Outlet lands.

Appendix, p. xvi.

June 16, 1880 (21 Stat. 248), Congress appropriated, in pursuance of this request, $300,000, to be charged to the Cherokee western lands, and to be expended as the Acts of the Cherokee legislature shall direct.

This $300,000 the Cherokees duly distributed, as they had theretofore distributed the $200,000, the Delawares getting their *pro rata* share. Thus was reaffirmed the former construction that "the Cherokee people," or "the whole Cherokee people," included the adopted citizens, Delawares, Shawnees, &c.

In 1881 the Cherokees were maintaining the assumption that under the provisions of the Act of Congress of May 29, 1872 (17 Stat. 190), and the appraisement of the Outlet lands under the requirements of that Act by the President and Secretary of the Interior, all their western lands had been sold to the United States at the rate of 47.49 cents per acre, excluding the Osage and some other small reservations. Accordingly the Cherokee Council, by an Act, instructed its delegation at Washington "to secure without "further delay the remainder of the price still due" on the lands of the Cherokees lying west of the Arkansas River (balance of the Outlet then unsold). The Act further provided that $500,000 of the money when paid should be "invested as a permanent school or seminary fund, to be "invested in the same manner as other funds of the Chero-"kee Nation; and said delegation shall endeavor to secure "a *per capita* payment of as large a proportion of the re-

" mainder as can be obtained, *to be applied in the same* " *manner as the first payment of the* $300,000 *on said* " *lands was obtained.*" (Appendix, p. xvii.)

Two important things are to be noted in this Act: First, that $500,000 were to be set aside as a school fund in which all citizens had equal share. Second, as large a *per capita* payment as possible was to be secured and "applied in the " same manner as the first payment of $300,000," &c. Now, the first payment of $300,000 was distributed *per capita* to " the whole Cherokee people." And the " whole " Cherokee people " included the Delawares.

Here is deliberate Cherokee legislation, as late as 1881, looking to the disposition of the whole Outlet and the distribution of the proceeds for the benefit of all the citizens—without exclusion.

At this point we ask the attention of the court to the following Act approved as early as 1873:

"AN ACT AUTHORIZING THE TRANSFER, OR SALE, OF CHERO-
" KEE LANDS, WEST OF THE ARKANSAS RIVER, AND THE
" MANNER OF DISPOSING OF THE PROCEEDS.

" *Be it enacted by the National Council:*

" That the delegation of the Cherokee Nation to the city " of Washington be and are hereby authorized to nego- " tiate with the Government of the United States for the " sale, or transfer, (in such manner not inconsistent with na- " tional obligations, and as may be most conducive to the " interests of the Cherokee people) of all of the Cherokee " lands lying west of the Arkansas river, and south of Kan- " sas, and commonly known as the Cherokee Outlet.

" *Be it further enacted,* That the proceeds of the sale, or " transfer of the lands aforesaid, be paid, with the consent " of the United States, in whole or in part, to the Cherokee " people '*per capita.*'

"And the Principal Chief is hereby authorized to order " an enumeration, or census, of the people whenever by him

" deemed expedient: *Provided*, That the salt plains, with " their immunities, profits and privileges undivided, be re- " served to the Cherokee people.

"Approved, November 28, 1873.

" WILL. P. ROSS."

Constitution and Laws, Cherokee Nation, edition 1875, p. 266.

It is clear from various acts of the Council subsequent to 1873, as set out above, that the Cherokees understood their own phrase, "the Cherokee people," as including their adopted citizens. They gave it this practical construction by dividing a half a million dollars, received from the Outlet, among their people, on that basis. Their enactments and conduct in this regard are uniform and consistent from 1867 to 1883.

But we now urge special attention to this law of November 28, 1873, as ending all contention on the part of the appellants, that they permitted the Delawares to share in the two appropriations of $200,000 and $300,000, respectively, on the sole ground of charity. There is no evidence of any shortage of breadstuffs in the Cherokee country in 1873. And this Act does not contemplate simply the distribution of a small payment of $200,000 or $300,000, but " all of " the Cherokee lands lying west of the Arkansas River, and south of Kansas, *and commonly known as the Cherokee Outlet*," is to be sold and the proceeds paid to " the Cherokee people" *per capita*.

From the time when the Delawares settled in the Cherokee country (1867) up to 1883 they were accorded, without question, *all* the rights of native Cherokees. They took possession of tracts of land, and improved and cultivated the same, cut timber, quarried stone, worked saline springs on the public domain; shared in the benefits of the schools and asylums and hospitals; voted and held offices; and

finally received their proportionate share of funds—the proceeds of lands west of 96°—exactly as did the Cherokees by blood. Here were sixteen years of uniform construction of the relations of the two tribes. During all this time the Cherokees by blood dominated the Council and furnished all the chief executive officers.

These facts must make it clear to the mind of the court that at the time the treaty of 1866 was made, defining the rights of such friendly Indians as should be incorporated with the Cherokees under its provisions, and again when the Cherokees amended their constitution to make it agree with the terms of that treaty, and when they made the contract with the Delawares in 1867, and for 16 years thereafter, the Cherokees understood that the Delawares were citizens of the Nation without any limitations. The construction given by them to the words of the treaty, and constitution, and contract, were contemporaneous and continuous. That any other meaning might attach was an afterthought begotten of the circumstances we have set forth.

Change of Construction in 1883.

Suddenly it dawned upon the Cherokee mind that the Outlet lands were becoming quite valuable. Stock-raisers were seeking to lease them for grazing purposes. The United States were being pressed to purchase them for white settlement. A very large sum was likely to be realized upon their disposal. Cupidity suggested that if the Delawares, Shawnees, and freedmen could be debarred from sharing in the proceeds, the dominating Cherokees by blood would have an immense fortune to divide among themselves.

In the Sundry Civil Appropriation Act of March 3, 1883, Congress had appropriated $300,000 "out of the funds due

under appraisement for Cherokee lands west of the Arkansas River, which sum shall be expended as the Acts of the Cherokee legislature direct" (25 Stat. 608).

In the month of May following, the Cherokee Council passed an Act providing for paying the $300,000 to Cherokees *of blood only* (Appendix xviii). This Act their Principal Chief, Bushyhead, vetoed on the ground that it violated their constitution and treaties (Appendix, p. xxv). The Council promptly passed it by the requisite two-thirds majority over the veto, and the money was accordingly paid out to Cherokees by blood only. Congress corrected this injustice, as we have elsewhere explained, by the passage of the Act of October 19, 1888 (Appendix, p. x).

Here was the first attempt to deprive the adopted citizens of the Cherokee Nation of their complete rights, and it is significant that on the same day that the Council passed the Act over the veto, it also passed an Act providing for the leasing of the Outlet at a rental of $100,000 per annum.

Three years later (April 27, 1886) the Council passed a most extraordinary Act entitled:

"Construction of the rights of Cherokee citizenship as "designed to be conferred upon freedmen and friendly "Indians by the 9th and 15th articles of the treaty of 1866." (Appendix, p. xviii.)

In this curious enactment the Council declares that the phrase, "all the rights of native Cherokees," meant simply the civil, political, and personal rights, but not a right in the Cherokee domain or the proceeds thereof. There is no attempt in the Act to construe the contract with the Delawares.

The next day after the passage of the above Act (April 28, 1886) the Council passed another Act providing for the

distribution, to Cherokees of blood, of $295,000, proceeds of the leased Outlet. Subsequently (1890) $300,000 more of the lease money was similarly distributed. This was immediately followed by the Act of Congress sending the matter to the Court of Claims for adjudication.

To show the inconsistency of the Cherokee Council in attempting to give such a construction to the treaty of 1866, we call attention to the different construction given the same words in connection with the adopted Creeks. A large number of Creeks were incorporated into the Cherokee Nation. The census of 1880 gives their numbers at 232—nearly one-half as many as the adopted Shawnees. Their rights were defined by an Act of the Council of November 13, 1843, as being "admitted to the enjoyment of "the rights and privileges of citizenship of this Nation." (Appendix, p. xiii.)

Under this guaranty the Creek citizens of the Cherokee Nation have had all the rights of natives, including the distribution of proceeds of the public domain from which the Delawares were excluded.

Failure of Consideration.

Counsel for the Cherokees urge that the amount paid by the Delawares to the Cherokees in pursuance of their mutual contract of 1867 was wholly insufficient to sustain the claim that the Delawares were to share in the ownership of lands lying west of 96°.

But the claims made by counsel as to the value of the property of the Cherokees in 1866–'7, and the alleged disproportion between that value and the amount of cash paid in by the Delawares, will, upon examination, be found greatly exaggerated.

The Delawares paid in cash into the Cherokee national

fund, all told, $279,424.28. Of this sum, $121,824.28 were paid, as understood by the respective parties, to enable the Delawares to own a *pro rata* share of said national fund. The balance, $157,600, was paid by the Delawares for the purchase of the right to *occupy* certain lands in the Cherokee country, which were then unoccupied, to the extent of 160 acres for each Delaware. The Cherokees at that time numbered 13,000, and were occupying a reservation of 5,000,000 of acres. Literally millions of acres of it were unoccupied. It was an unprofitable waste. White persons were excluded from entering this great domain. The only use the Nation could make of its surplus lands was by settling them with friendly Indians. Friendly Indians incorporated into the Nation strengthened it for the coming struggle with the aggressive white man. The Cherokees, with all the other, so-called, civilized tribes in the Indian Territory, dreaded the approach of the white settlements. If their reservations were filled, or nearly filled, there would be less excuse for breaking up their autonomy and subjecting them to the white man's government. This is history. Therefore the mere settlement of "friendly Indians" upon their home reservation was a thing desired, and from their standpoint a matter of great value to them, the Cherokees.

There is no record to the effect that the Cherokees were at all opposed to that article of the treaty. And in considering the facts connected with the settlement of the Delawares it must be remembered that on account of their wealth, intelligence, education, and industry they were a most desirable element to be incorporated with the Cherokees. They at once added largely to the taxable wealth of the Nation, as well as its strength in numbers and intelligence. This was, no doubt, a "valuable consideration" taken into account by the parties to the contract.

With this in mind we proceed to examine briefly in detail

the statistical showing of appellants on which they base the claims of failure of consideration.

Appellants state the real estate holdings of the Cherokees at the time of their agreement with the Delawares as follows:

Strip lands in Kansas	400,000 acres
Neutral lands in Kansas	1,000,000 "
Lands west of 96°	8,000,000 "
Lands east of 96°	5,000,000 "

All of which they value at $1.25 per acre, except the neutral lands, which are placed in the contract at the lumped sum of $1,000,000, making a total with the cash which then belonged to the Cherokees in their national fund of $18,428,000. This sum they divide by 13,000, the population of the Cherokees, which gives a *per capita* wealth of $1,416. And they estimate the *per capita* amount paid in by the Delawares at $283.68. Here is the inadequacy of the consideration. The wealth of the Cherokees amounted to $1,416 *per capita*, and the Delawares are claiming to own equal interest in this larger sum by paying in only $283 *per capita!*

By adding the whole amount the Delawares paid into this estimated wealth of the Cherokees and dividing the sum by 13,985 (the united population of the Cherokees and Delawares) we have a *per capita* of $1,338, being only $78 less *per capita* than the original wealth of the Cherokees as computed by counsel.

But the lands in 1867 were not worth $1.25 per acre. In fact they were not worth one-third that amount. This is the full cash value of wild or unimproved lands when sold in small tracts of 160 acres each, the purchaser getting a fee-simple title. But to claim such a valuation on the whole of a vast tract of 8,000,000 of acres, where the purchaser would get nothing but an Indian title, is absurd.

A valuation of the Indian title to the lands in the Indian Territory west of 96° can be found in the various treaties made between the United States and the so-called "civilized tribes" in 1866. The Creeks in their treaty sold the United States 3,250,560 acres, being the west half of their reservation, for $975,168, which was exactly 30 cents an acre.

Indian Treaties, 116, Art. 3.

The Seminoles, at about the same time, sold the whole of their existing reservation, surrendering it completely, for 15 cents an acre. This reservation contained 2,169,080 acres, comprising the land lying between the main stream and North Fork of the Canadian River, and was perhaps the most desirable land in the Indian Territory.

Indian Treaties, 812, Art. 3.

The treaty with the Choctaws and Chickasaws, of the same year, provided for large cessions to the United States, at a rate of about 5 cents an acre.

Indian Treaties, 286, Art. 3.

These are estimates fixed by the United States and the Indians themselves upon the Indian title to lands in the Indian Territory but one year before the contract between the Cherokees and Delawares was executed. The lands were similarly situated to those in the Outlet. They were equally valuable. Some of them, especially the Seminole lands, much more valuable. The price paid by the Government for Indian lands is usually higher than that paid where one tribe sells to another tribe. The title by which the Creeks, Seminoles, Choctaws, and Chickasaws held their western lands was the same, or of a higher character, than the title by which the Cherokees held the Outlet. But admitting here, for the purposes of the argument only, that

the Cherokees had some broader claim on the Outlet than a mere right of easement, yet there is no reason why in 1866–'7 such title, whatever it was, would have been worth more than the title of the Seminoles to their reservation lying in the valley of the Canadian.

As a further test of the value of the Outlet lands, we call the attention of the court to their estimated value in 1879—fully twelve years after the Delaware contract. By the provisions of the 5th section of the Act of May 29, 1872 (17 Stat. 190), the President and Secretary of the Interior were authorized to appraise the Cherokee lands west of the 96th meridian, excepting the Osage lands, and report their value to Congress. Under this Act the Secretary appointed three commissioners to examine and report as to the value of the land. Upon considering the report of these commissioners, Mr. Secretary Schurz reported his conclusions to the President, who ratified the same by the following letter:

"EXECUTIVE MANSION, *June* 23, 1879.

"The action of the Secretary of the Interior, as conveyed "to me by letter dated the 19th inst., in appraising and fix- "ing the value of certain lands ceded by the Cherokee In- "dians to the United States, to be used in the settlement of "friendly Indians, as follows:

"Lands lying west of 96 degrees west longitude in In- "dian Territory, set apart under Act of April 10, 1876, "(19 Stats. 29,) as a portion of the reservation for the Paw- "nee Indians, embracing an area of 230,014.04 acres, at 70 "cents per acre.

"All other lands ceded by the Cherokees in the treaty of "1866, Article 16 (14 Stats. 304), embracing an area of "6,344,562.01 acres, at 47.49 cents per acre, is hereby ap- "proved and ratified as my act under the Act of May 29, "1872.

"R. B. HAYES."

Here is a deliberate estimate, after full examination, of

about 47½ cents an acre. And at this time the lands were much more valuable than in 1867. Then there was plenty of public lands in Kansas and Territories outside the Indian Territory. But in 1879 the Government realized that it must soon acquire the western part of the Indian Territory for white settlers.

And we call attention to the significant fact that the Cherokees were willing to accept 47½ cents an acre for their land, and as late as 1882 stoutly urged payment on that basis. (Appendix, p. vii.)

Considering all these facts, we are well warranted in concluding that the Cherokee lands, both east and west of 96°, did not exceed in value in 1867 the value placed upon the Seminole lands in 1866, to wit, 15 cents an acre. The total fortune of the Cherokee people in 1867, computed on this basis, can be clearly stated as follows:

Strip lands	400,000 acres
Lands west of 96°	8,000,000 "
Lands east of 96°	5,000,000 "
Making a total of	13,400,000 acres
13,400,000 × 15 cents =	$2,010,000
Value of neutral lands as provided in contract	1,000,000
Cash in Cherokee national fund	678,000
Total fortune of Cherokees in 1867	$3,688,000

Now, divide this latter sum by 13,000, the whole number of Cherokees at that time, and the result is a *per capita* wealth of $283.69. This is exactly the amount paid in, *per capita*, by the Delawares. This result is so surprising that we are led to believe that the contracting parties, having in mind the amount received by the Seminoles for their lands, used it as the basis of their computations—reaching the result as we have here reached it.

But if we should admit, for the purpose of argument, that the sum paid by the Delawares was not in proportion to the value of all the lands of the Cherokee Nation, it is conceded to have been all that they were required to pay under the terms of the contract. And the contract was made between parties who dealt on equal footing, and was approved by the United States, a disinterested third party, having the same regard for the interests of each. It is well-settled law that inadequacy of consideration alone is not sufficient to avoid a contract. As Mr. Justice Bradley said in Graffam *v.* Doble (117 U. S. 180), "the rule has become almost universal that "a sale will not be set aside for inadequacy of price, unless "the inadequacy be so great as to shock the conscience, or "unless there be additional circumstances against its fair-"ness." And in the same case, quoting Kerr on Fraud and Mistake, the same Justice says: "Inadequacy of con-"sideration, if it be of so gross a nature as to amount in "itself to conclusive and decisive evidence of fraud, is a "ground for cancelling the transaction."

It will hardly be contended that this contract, made between parties equal in business experience and intelligence, made after a full and free conference (as recited in said contract), made in pursuance of and according to the terms of a prior treaty, made under the supervision of and bearing on its face the unqualified and disinterested approval of the United States, acquiesced in by both parties without question for twenty years, is based on a consideration so inadequate "as to amount in itself to conclusive and decisive "evidence of fraud." As was said by Principal Chief Bushyhead in the veto message above referred to, "The "Cherokee Nation of Indians had the right of property-"holders to either sell their common property to or share "it with others, if they saw fit, for large or little consid-"eration, by agreement, contract, or treaty by their own "motion and will."

Now, considering the parties to the contract under discussion—that they were equal in intelligence and opportunity, and abundantly capable of transacting their respective affairs, and that they entered into the engagement with a preamble setting forth, among other things, that "whereas "a full and free conference has been had between the rep- "resentatives of the Cherokees and the Delawares, in view "of the treaties herein referred to, looking to a location of "the Delawares upon the Cherokee lands and their con- "solidation with said Cherokee Nation: Now, therefore, "it is agreed," &c.; and, in view of the facts above set forth, it must be apparent that the contention of inadequate consideration has utterly failed.

The Cherokee Title to the Outlet.

In addition to the reasons just stated, for the sufficiency of the consideration paid by the Delawares, it is quite likely that the parties took into account the very limited title by which the Cherokees held possession of the Outlet. Both parties were well aware of the conditions of Article 16 of the 1866 treaty. And they were familiar with the history of the contention between the United States and the Cherokees concerning those lands.

This 16th Article provides that "the United States may "settle friendly Indians in any part of the Cherokee country "west of 96°, to be taken in compact form and in quantity "not exceeding 160 acres for each member of each of said "tribes thus to be settled; the boundaries of the tracts to "be distinctly marked and the land to be conveyed in fee- "simple to each of said tribes, to be held in common or by "their members in severalty, as the United States may "decide." The Cherokees were to be allowed to contract with such tribes for the price of the lands, and the United

States was to pay them the price agreed upon, but if the Indians failed to agree, the price was to be fixed by the President. The Cherokees were only to retain jurisdiction over that portion of their reservation lying west of 96° (the Outlet) as from time to time remained unsold.

Comparing the provisions of this article with those of Article 15, it is clear that the parties to this treaty considered that portion of the Cherokee country lying east of 96° in an entirely different light from the portion lying west of that meridian, and known as the Outlet. When Mr. Calhoun had jurisdiction of Indian affairs, as Secretary of War, he assured the Cherokees, in writing, that their title to the Outlet was indicated by the term itself. He said to them: "You acquire thereby no right to the soil, "but merely an outlet, of which you appear to be already "apprised." (See H. R. Report No. 3768, 51st Cong., 2d Sess., p. 12.) In the treaty of May 6, 1828, the United States provided a reservation for the Cherokees, which substantially covered the ground of the present reservation lying east of 96°, and embracing 7,000,000 acres. Following the description of the reservation thus made, the treaty provides:

"In addition to the 7,000,000 of acres thus provided for "and bounded, the United States further guarantees to the "Cherokee Nation a perpetual outlet west of the western "boundary of the above-described limits, and as far west as "the sovereignty of the United States and their right of "soil extend."

7 Stat. 311, Art. 2.

It is true that in December, 1838, a patent was issued to the Cherokees for their reservation, which included the Outlet as well as the land east of 96°; but the stating part of this patent set out the treaty of May 6, 1828, and other

treaties, which characterized the lands west of 96° as an *outlet*, and the grant was then made "subject also to all "the other rights reserved to the United States in and by "the articles (of treaties) hereinbefore recited to the ex- "tent and in the manner in which the said rights are so re- "served."

Report No. 3768, *supra*.

Resting upon the reservations and restrictions set out in various treaties which preceded the patent of 1838, and the expressed conditions of that patent, the United States has always claimed that the Cherokee Outlet was held by the Cherokee Nation by an estate something less than that by which it held the lands east of 96°. And this claim is obviously asserted by the United States and conceded by the Cherokees in the treaty of 1866. By the provisions of Article 15 the Indians are to be consulted as to other Indians and other tribes whom it is contemplated to settle among them east of 96°, and as to individual Indians and disorganized tribes, they hold an absolute veto. But when it comes to dealing with the Outlet, the treaty grants to the United States the authority to place any tribes upon it in their discretion, limited only by the provision that they shall be "friendly Indians." In other words, the contention of the Government that the Cherokees only had an easement in the Outlet is recognized. They might go and come over this great tract, but they could not settle upon it. It was not intended for their home. The 7,000,000 of acres east of 96° was, in the language of the treaty of 1828, for their "permanent home," and, as stated by the same treaty, the lands west of these were given as "an outlet."

The Cherokees had nothing to sell in the Outlet but their right of way. They could not legally lease the ground for pasturage. (Opinion Attorney-General Devens, Febru-

ary 25, 1880; opinion of Attorney-General Garland, July 21, 1885.) And, realizing their limited title to the Outlet, they assented to the 16th Article of the treaty.

It would therefore be no occasion for surprise that when the Cherokees came to contract with the Delawares in 1867 no special attention was paid by either party to any present or prospective value of the rights of the Cherokees in the Outlet. This contract was made the next year after the question of the tenuosity of the tenure by which the Cherokees held those lands had been brought home to them.

Were there Omissions in the Contract?

Counsel for the appellants contend that the Cherokees and Delawares in making their agreement did not have in contemplation all the provisions of the 15th Article of the treaty. They reach this conclusion from the fact that only the proceeds from the neutral lands are mentioned as forming part of the national fund, which should be a basis for the payment to be made by the Delawares, the Strip lands, the Outlet, and the home reservation not being mentioned.

But the agreement starts out with a reference to that article and its provisions, and declares that upon "a full and free conference" had between the parties, and "in view of the treaties herein referred to," the contract is entered into. The parties to this contract were equals. They were two tribes well advanced in civilization. And each was specially represented by its foremost man—William Ross, as Principal Chief of the Cherokees, and Charles Journeycake, Principal Chief of the Delawares. These men were no tyros, either in business or diplomacy. Chief Ross was undoubtedly familiar with every clause and every provision of the treaty. Its negotiation had stirred

the Cherokee people tremendously. Two sets of delegates had been sent to Washington by the two contending factions of the Nation. The Ross faction made one set of the delegates. And during the negotiations every proposition of the United States delegates was challenged, and every clause scanned and criticised. The agreement between the Cherokees and Delawares was made only nine months after this treaty was proclaimed. Is it possible that under these circumstances important provisions in Article 15 were overlooked in drawing up the agreement? And it must not be forgotten that the Secretary of the Interior duly approved this agreement that followed so close upon the heels of the treaty.

This claim of counsel will not do. It cannot stand. The contract between the parties must be judged by what it contains and not by supposed omissions on the part of those who executed it. It defines with accuracy and precision each provision. The instrument would do credit to any attorney. Had the intention existed in the minds of both parties, as contended here, that the words declaring the Delawares as thereafter *incorporated into the Cherokee Nation with the same rights and immunities as native Cherokees*, were to give them only a limited citizenship—some thing different from what the Cherokees of blood were to enjoy—is there any doubt that such an intention would have been clearly expressed?

"The Absolute Right of Self-Government in the Cherokees."

Under this caption counsel for appellants devote many pages of their brief with the apparent intention of calling in question the jurisdiction of the Court of Claims and this court to pass upon the controversy. This point is not raised in the pleadings. It is too late now. The appellants

appeared as defendants below, joined issue, and tried the case.

Counsel forget that Congress has complete ultimate jurisdiction over all Indians. This court, in United States *v.* Kagama (118 U. S. 375), held:

"While the Government of the United States has recog-
" nized in the Indian tribes heretofore a state of semi-inde-
" pendence and pupilage, it has the right and authority,
" instead of controlling them by treaties, to govern them
" by Acts of Congress, because they are within the geo-
" graphical limit of the United States, and are necessarily
" subject to the laws which Congress may enact for their
" protection, and for the protection of the people with whom
" they come in contact."

The only authority cited that seems to even squint at the "absolute right of self-government in the Cherokees" is the opinion of Attorney-General Miller on page 39 of appellants' brief. And this eminent attorney suggests certain authority in the Choctaw and Chickasaw Nations to make their own laws, but "subject, doubtless, to the rule that such laws must not be in conflict with the Constitution and laws of the United States." And the treaty of 1866, which we claim was violated, is one of the laws of the United States. It also happens to be one of the laws of the Cherokee Nation; in fact, a law of such dignity and consequence that that Nation deemed it proper to amend its constitution to make it consistent with the law. Then there is the law authorizing this suit which very plainly confers jurisdiction on the Court of Claims and this court.

The Freedmen not Entitled.

Counsel call attention to the fact that the 9th Article of the treaty of 1866 bestows upon the freedmen of the

Cherokees "all the rights of native Cherokees." They then declare that there is not a vestige of justification for the pretence that the Government intended to confer upon these former bondmen any part of the ancestral possessions of the Cherokees. In fact, our brethren burst forth with the indignant statement that "such a proposition is preposterous and outrageous upon its face."

And from this they deduce the conclusion that if the words, "all the rights of native Cherokees," in connection with the freedmen, does not give them a right in the Cherokee lands, of course the same words in the same treaty with reference to friendly Indians must be similarly construed.

The argument limps. It excludes the freedmen from the full benefit of those words because they were slaves, and because no such drastic measures were applied to the whites of the Southern States, and *because* it would be an outrage. That is, it would have been an outrage for the United States to have required the Cherokees to share their annuity money and their lands with their former slaves.

But the Government was, beyond all possibility of mistake, guilty, at that very time (1866), of just such an outrage on the Creeks. They had gone into rebellion just as the Cherokees had. They were being reconstructed by a similar treaty. The rights of their freedmen were fixed by the following words: "Shall have and enjoy all the rights "and privileges of native citizens, *including an equal in-* "*terest in the soil and the national funds.*"

So the Government can be guilty of such outrageous things, and a pertinent inquiry is: If the United States imposed such a condition on the Creeks, with whom they had the least trouble, and suffered the least annoyances, why should they not impose it upon the Cherokees, who had given the greatest trouble and annoyance?

Conclusion.

Giving the words used in the treaty and in the contract their natural and usual meanings, it is impossible to resist the conclusion that the Delawares, upon compliance with the terms thereof, did become citizens of the Cherokee Nation, on an equality in every respect with native Cherokees. The language of the treaty of 1866 could hardly be clearer or more explicit. It provides that the Indians so settled in the Cherokee country shall "be incorporated into and "ever after remain a part of the Cherokee Nation, *on equal* "*terms in every respect* with native citizens." This treaty was the authority under which the Cherokees and Delawares acted in making the contract of 1867. It conferred the power upon them to enter into the contract. They were bound by the conditions of this treaty, and the settlement of the Delawares on Cherokee lands could only be effected according to its terms. The Delawares were entitled to all rights granted in said treaty to Indians locating in the Cherokee Nation according to its provisions. The treaty is recited in the contract as conferring the authority to enter into the agreement.

And the contract of 1867 was, properly, not less broad and definite in its terms. The Delawares "*shall become* "*members of the Cherokee Nation*," with the "same rights "and immunities" as native Cherokees. And their children "shall in all respects be regarded as native Cherokees."

It is difficult to add to the strength of the above terms by authority, argument, or illustration. There is no room for construction, for the very idea and purpose of construction imply a previous uncertainty as to the meaning; where this is clear and unambiguous, there is nothing for construction to do. If any construction were admissible, the presumption always entertained by the courts is in

favor of the comprehensive over the restricted. If the Cherokee Nation had wished or intended to restrict the rights of the Delawares as citizens or members of the nation, it should have so provided in the contract. The Cherokee constitution makes no distinction or restriction on the rights of citizens of the Nation. It is a novel proposition for that Nation to ask this court to attach to the rights of its citizens qualifications, limitations, and restrictions which neither its own constitution nor the solemn contract under which a portion of its citizens were incorporated into the Nation contain. It asks the court to create a new and anomalous class of "citizens"—citizens with restricted rights, citizens who are burdened with all the responsibilities of government; sharers in the common misfortunes, but not participators in the common prosperity; partners in losses, not in profits; and to effect this result contrary to its own supreme law! The effect on the Nation of a condition of affairs so unjust, inequitable, and unreasonable can be easily imagined. It would disintegrate the most prosperous government.

But the rights of the Delawares under this treaty and contract have been heretofore construed. While these constructions are not binding upon this court, they are entitled to persuasive weight and careful consideration. The first is the construction by the Cherokee Nation itself in the most solemn manner, and, too, at a time contemporaneous with the execution of said treaty and contract.

As already stated, the constitution of the Cherokees, prior to the treaty of 1866, provided that only "native "Cherokees" should be citizens of the Nation. The treaty of 1866 contemplated the incorporation into the Nation of other Indians. To meet this new condition of affairs, a condition existing by the consent of and according to terms agreed to by the Cherokee Nation, the constitution was

amended to include as citizens Indians adopted into the Nation pursuant to the said treaty. And, at the same time, the constitution was not amended or changed in any respect with reference to the rights of citizens. It is unnecessary to argue the point that those who were thus added by the constitution to the ranks of citizens possessed the same rights as those who had previously been citizens. And as the lands of the Nation were and are by the same constitution the common property of the Nation, the new citizens became, *ipso facto*, sharers in this common property, and entitled to their *pro rata* part of the proceeds thereof. And no citizen could be deprived of his right or interest therein without a violation of the constitution.

It is respectfully submitted that this construction and interpretation of the rights of the adopted Delawares, made at a time contemporaneous with the contract and treaty, is entitled to great weight.

Another construction of the rights of the Delawares occurs in the veto message of D. W. Bushyhead, Principal Chief of the Cherokee Nation (Appendix, p. xxv). This was a veto of a bill passed by the Cherokee legislature providing for the distribution *per capita* among native Cherokees only of the funds derived from the sale of Cherokee lands. While the bill was passed over this veto, it is submitted that the argument against the bill was, and is, unanswerable. The message itself, both from a moral and legal standpoint, is fit to rank among the state papers of any nation. And we also here call attention to the report of the Committee on Federal Relations of the Cherokee Council (Appendix, p. xxiii).

A construction of the rights of the Delawares under this treaty and contract by the Executive Department of the United States occurs in the letter of the Hon. Hiram Price, Commissioner of Indian Affairs, which is printed in Senate

Ex. Doc. No. 86, 48 Cong., 1st Sess. After a complete statement of the controversy, he declares that "the constitution and the agreement are so plain and direct that "but one construction can be placed thereon," *i. e.*, that these adopted Indians are entitled to all the rights of citizens of the Cherokee Nation, which rights include a share in the funds derived from the sale of the lands of the Nation.

A similar construction was given by Commissioner Atkins in a letter to the Secretary of the Interior of February 13, 1886, in which he declares in the most emphatic manner that the distribution of the lease money to the Cherokees by blood was in violation of the treaty of 1866, and the contracts with the Delawares and Shawnees. The conclusions of the Commissioner are endorsed by Secretary Lamar in the following terms:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *February 27*, 1886.

"THE PRESIDENT: I have the honor to submit herewith "copy of a report of 13th instant from the Commissioner "of Indian Affairs, presenting, with accompanying papers, "a draft of proposed legislation for securing to the Cherokee freedmen and others, citizens of the Cherokee Nation "by adoption and incorporation, a sum equal to their proportion of the $300,000 appropriated by the Act of March "3, 1883 (22 Stat. 624), which provides as follows:

"That the sum of $300,000 is hereby appropriated, to be "paid into the treasury of the Cherokee Nation, out of the "funds due under appraisement for Cherokee lands west of "the Arkansas River, which sum shall be expended as the "Acts of the Cherokee legislature direct, this amount to be "immediately available. * * *

"For the distribution of this sum the Cherokee legislature passed an Act May 19, 1883, restricting its payment "to 'the citizens of the Cherokee Nation by Cherokee "blood.'

"There appears to be no conflict between the Act "of the Cherokee legislature made and provided for the "distribution of this fund and the Act above cited making "the appropriation. *But when it is examined in the light "of the provisions of treaties and agreements relating "thereto—full mention of which will be found in the re-"port of the Commissioner—the claim of the complain-"ants is, in my opinion, well founded in right and "justice.*

"I therefore submit the matter for your consideration, "and respectfully recommend that it be presented to Con-"gress for such action as that body may find to be right "and necessary to remedy the wrong complained of.

"I have the honor to be, very respectfully,

"Your obedient servant,

"L. Q. C. LAMAR,

"*Secretary.*"

(Senate Ex. Doc. No. 82, 49 Cong., 1st Sess.)

Congress has also expressed its opinion as to the rights of the Delawares, by the Act of October 19, 1888 (U. S. Stat. vol. 25, p. 608). (Appendix, p. x.) This Act appropriates the sum of $75,000 to be paid the Delawares (and others) who were deprived of their *pro rata* share of money appropriated by Congress in 1883 to pay for lands bought of the Cherokee Nation, and which the Cherokee legislature had, as before stated, distributed only to native Cherokees. This Act recites that "whereas by the said Act of the "Cherokee legislature the aforesaid freemen, Delaware "and Shawnee Indians, have been deprived of their legal "and just dues guaranteed them by treaty stipulations," and makes the $75,000 appropriated a lien on the lands of the Cherokee Nation.

It is apparent that the constitution of the Cherokee Nation, the opinion of its Principal Chief, and the executive and legislative branches of this Government sustain the rights of the Delawares asserted in this suit.

It remains to consider briefly the excuses presented by the native Cherokees for their failure to accord to the Delawares equal rights as citizens of the Cherokee Nation.

The first defence of the Cherokee Nation is embodied in an Act of the Cherokee legislature approved April 27, 1886, entitled "An Act for the construction of rights of Cherokee citizens as designed to be conferred upon freedmen and friendly Indians by the ninth and fifteenth articles of the treaty of 1866." This remarkable legislative "construction" enacts "that the phrase 'all the rights of 'native Cherokees,' as used in the 9th and 15th articles of the treaty of July 19, 1866, between the United States and this Nation, is hereby construed to mean the individual rights, privileges, and benefits enjoyed by white adopted citizens of this Nation before and at the making of said treaty, and who had been by law admitted to all the rights of a native Cherokee, civil, political, and personal, as subjects of the Cherokee Nation of Indians, without acquiring any right or title to the Cherokee domain or to the proceeds thereof." * * *

Considering this "construction" seriously, two points are obvious:

1st. It does not purport to construe the *contract* made by the Cherokee Nation with the Delawares in 1867, wherein it is provided that the latter "shall become members of the Cherokee Nation, with the same rights and immunities" as native Cherokees. It is confined to the treaty. The legislative power of construction was probably exhausted in making the words "be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with the native Cherokees," in the treaty mean "the individual rights, privileges, and benefits enjoyed by white adopted citizens, * * * without acquiring any right or title to the Cherokee domain or the proceeds thereof"!

2d. The treaty evolved by this "construction" is an entirely different treaty from that actually made. There is not the slightest intimation in either the treaty or the contract of any such limitations on the rights of the Delawares, nor does the constitution of the Cherokee Nation place any such restrictions or limitations on the rights of Cherokee citizenship. The "treaty" constructed by the Cherokee legislature of 1886 is an entirly different treaty from that of 1866, to meet the new conditions of which the Cherokee constitution was amended so that the definition of citizenship therein should be broad enough to embrace the Indians who located in the Cherokee country under the terms of said treaty. That constitutional amendment, simultaneous with the treaty, is a far more impressive construction (if construction were necessary) than the act of the Cherokee legislature twenty years after, when rights under the treaty and contract had become fixed and vested.

A second defence of the Cherokee Nation is that because one hundred and sixty acres of land were set apart for each individual of the Delawares east of the ninety-sixth degree of west longitude (for which they paid one dollar per acre), that therefore they acquired no rights in the other Cherokee lands, the common property of the Nation. It will be noticed that the lands so paid for were, by the contract, set apart "for the occupancy" only of the Delawares. For reasons perfectly apparent, it was deemed wise that the Delawares should be located together and that the possession of the lands which they should live upon, cultivate, and improve should be secured to them. They were strangers in a strange land, and a small minority of the Nation. It would have been a source of interminable confusion if their location in the Cherokee country had been a matter of uncertainty. But as they became citizens of the

Nation, " with the same rights " as the native Cherokees, and as the Cherokee constitution made all lands the common property of the Nation, it is difficult to see any reason why their occupancy of particular lands destroyed their rights as citizens to the common property of the Nation. The Cherokees themselves could not physically occupy all or any large part of the lands of the Nation. It is not a question of occupancy, but of rights as citizens of the Nation in the common property of the Nation when that common property is sold and the proceeds divided.

Notwithstanding the Delawares were entitled, by virtue of the treaty and their contract, to have a compact tract of land set off to them in the Cherokee country by metes and bounds, yet it is a fact that no such thing has ever been done. By the tacit consent and understanding of both parties, the Delawares, from the first, have lived among the Cherokees, exactly as the citizens by blood have lived. They have individually gone upon unoccupied lands wherever they were found, and improved and occupied them under the Cherokee statutes exactly as other citizens did. They are now scattered over the whole Cherokee country.

We therefore ask that the decree below be affirmed with costs.

THOS. C. FLETCHER,
Atty. for Appellees.

J. H. McGOWAN,
Of Counsel.

APPENDIX.

[PUBLIC—No. 335.]

An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject-matter herein provided for.

SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the

emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated.

* * * * * * * * * * *

ARTICLE 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to

settle east of the 96° of longitude without the consent of the Cherokee National Council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said Council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude.

ARTICLE 16. The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee-simple to each of said tribes to be held in common or by their members in severalty as the United States may decide.

Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

ARTICLE 17. The Cherokee Nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835; and also that strip of the land ceded to the Nation by the fourth article of said treaty which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State.

The lands herein ceded shall be surveyed as the public

lands of the United States are surveyed, under the direction of the Commissioner of the General Land Office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee National Council and one by the Secretary of the Interior, and, in case of disagreement, by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

And the Secretary of the Interior shall, from time to time, as such surveys and appraisements are approved by him, after due advertisements for sealed bids, sell such lands to the highest bidders for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: *Provided*, That whenever there are improvements of the value of fifty dollars made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning, and in person residing on such improvements, shall, after due proof, made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in legal subdivisions, which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to pe paid by the secretary out of the proceeds of sale of said land: *Provided*, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body to any responsible party, for cash, for a sum not less than one dollar per acre.

* * * * * * * * * *

ARTICLE 23. All funds now due the Nation, or that may hereafter accrue from the sale of their lands by the United States, as hereinbefore provided for, shall be invested in the United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annu-

ally, on the order of the Cherokee Nation, and shall be applied to the following purposes, to wit: Thirty-five per cent. shall be applied for the support of the common schools of the Nation and educational purposes; fifteen per cent. for the orphan fund, and fifty per cent. for general purposes, including reasonable salaries of district officers; and the Secretary of the Interior, with the approval of the President of the United States, may pay out of the funds due the Nation, on the order of the National Council or a delegation duly authorized by it, such amount as he may deem necessary to meet outstanding obligations of the Cherokee Nation, caused by the suspension of the payment of their annuities, not to exceed the sum of one hundred and fifty thousand dollars.

(Revision of Indian Treaties, pp. 89, 92, 93, 94, 95.)

LETTER FROM D. H. ROSS AND R. W. WOLFE, DELEGATES, AND W. A. PHILLIPS, SPECIAL AGENT, TO SECRETARY KIRKWOOD, JANUARY 11, 1882.

SIR: In compliance with our instructions we desire to bring before you a matter of considerable importance, calling for early action.

Your predecessor, under date of February 9, 1880, sent a communication to Congress containing the appraisement of certain lands belonging to us and lying west of the Arkansas River, being in all 6,514,576.05 acres. Of that amount 230,014.05 acres was appraised separately, and was to be paid for in a manner already prescribed by Act of April 10, 1876, and the remainder, 6,344,562, were appraised by the Secretary and the President as the law directed, in June, 1879, at 47.49 cents per acre, *making an aggregate of* $3,013,032.

Upon this there is due us interest from July 1, 1879, to the present date, or date of payment, at the rate of 5 per cent. per annum. Upon that amount there has been paid by an appropriation in the deficiency bill of 1880 the sum of $300,000, and also an appropriation last year of $50,000 passed to our credit last summer as sums paid on our lands

thus appraised at an aggregate for the entire tract of 47.49 cents per acre. It will thus be seen that there has been a full recognition of the amount thus due us by the President, the Department, and Congress. We have so far been unable to secure full payment, and now ask that you send an estimate for the principal and interest due us. Of the amount due we ask that the sum of $500,000 be invested under the Act of April 1, 1880, as a perpetual school and seminary fund, and that the remainder be placed to the credit of the Cherokee Nation, subject to the action of the Cherokee legislature or national council. * * *

(H. R. Report, 51 Cong., 2 Sess., p. 25.)

AGREEMENT BETWEEN THE SHAWNEES AND CHEROKEES CONCLUDED JUNE 7, 1869, APPROVED BY THE PRESIDENT JUNE 9, 1869.

Articles of agreement made and entered into at Washington, D. C., this seventh day of June, A. D. 1869, by and between H. D. Rees and William P. Adair, duly authorrized delegates representing the Cherokee Nation of Indians, having been duly appointed by the National Council of said Cherokees, parties of the first part, and Graham Rogers and Charles Tucker, duly authorized delegates representing the Shawnee tribe of Indians, parties of the second part:

Whereas it is provided by the fifteenth article of the treaty between the United States and the Cherokee Indians, concluded July 19, 1866, that the United States may settle any civilized Indians friendly with the Cherokees and adjacent tribes within the Cherokee country on unoccupied lands east of 96° on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with certain provisions specified in said articles; and

Whereas the Shawnee tribe of Indians are civilized and friendly with the Cherokees and adjacent tribes, and desire to settle within the Cherokee country on unoccupied lands east of 96°: It is therefore agreed by the parties hereto

that such settlement may be made upon the following terms and conditions, viz: That the sum of five thousand dollars belonging to the Shawnee tribe of Indians and arising under the provisions of treaties between the United States and the said Shawnee Indians as follows, viz., for permanent annuity for educational purposes, per fourth article of treaty 3d August, 1795, and third Article 10th of May, 1854, one thousand dollars; for interest at five per cent. on forty thousand dollars for educational purposes, per third Article of treaty 10th May, 1854, two thousand dollars; for permanent annuity in specie for educational purposes, per fourth Article of treaty 29th September, 1817, and third Article 10th May, 1854, two thousand dollars, shall be paid annually to the Cherokee Nation of said Indians, and that the annuities and interests as recited and the investment or investments upon which the same are based shall hereafter become and remain the annuities and interest and investment or investments of the Cherokee Nation of Indians, the same as they have been the annuities and interest and investments of the Shawnee tribe of Indians. And that the sum of fifty thousand dollars shall be paid to the said Cherokees as soon as the same shall be received by the United States for the said Shawnees from the sales of the lands in the State of Kansas known as the Absentee Shawnee lands, in accordance with the resolution of Congress approved April 7, 1869, entitled "A resolution for the relief of settlers upon the Absentee Shawnee lands in Kansas," and the provisions of the treaty between the United States and the Shawnee Indians concluded May 10, 1854, and also that the said Shawnees shall abandon their tribal organization.

And it is further agreed by the parties hereto that in consideration of the said payments and acts agreed upon as hereinbefore stated that the said Cherokees will receive the said Shawnees—referring to those now in Kansas, and also to such as properly belong to said tribe who may be at present elsewhere and including those known as the Absentee Shawnees now residing in the Indian Territory—into the country of the said Cherokees upon unoccupied lands east of 96°, and that the said Shawnees shall be incor-

porated into and ever after remain a part of the Cherokee Nation on equal terms in every respect and with all the privileges and immunities of native citizens of said Cherokee Nation: *Provided*, That all of the said Shawnees who shall elect to avail themselves of the provisions of this agreement shall register their names and permanently locate in the Cherokee country, as herein provided, within two years from the date hereof; otherwise they shall forfeit all rights under this agreement.

In testimony whereof the parties hereto have hereunto subscribed their names and affixed their seals on the day and year first above written.

[SEAL.] H. D. REES,
[SEAL.] WM. P. ADAIR,
Delegates Representing the Cherokee Nation of Indians.
[SEAL.] GRAHAM ROGERS,
[SEAL.] CHARLES TUCKER,
Delegates Representing the Shawnee Tribe of Indians.

Attest:
W. R. IRWIN.
H. E. MCKEE.
A. N. BLACKLIDGE.
JAS. B. ABBOTT.

An Act to secure to the Cherokee freedmen and others their proportion of certain proceeds of lands, under the Act of March third, eighteen hundred and eighty-three.

Whereas it is provided in the ninth article of the treaty of July nineteenth, eighteen hundred and sixty-six, between the United States and the Cherokee Nation of Indians, that freedmen who have been liberated by voluntary act of their former owners, or by law, as well as all free colored persons who were in the (Cherokee) country at the commencement of the rebellion, and were then residents therein, or who might return within six months, and their descendants, shall have all the rights of native Cherokees; and,

Whereas by the fifteenth article of the aforesaid treaty certain terms were provided under which friendly Indians

might be settled upon unoccupied lands in the Cherokee country east of the ninety-sixth degree of west longitude; and the Indians thus settled were, upon full compliance with the provisions of said article, to be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens; and,

Whereas under the provisions of the aforesaid fifteenth article an agreement was entered into between the Cherokee Nation and the Delaware tribe of Indians, on the eighth day of April, eighteen hundred and sixty-seven, which agreement was approved, respectively, by the Secretary of the Interior and the President of the United States on the eleventh day of April, eighteen hundred and sixty-seven, and by the terms of which the Delaware Indians "became members of the Cherokee Nation, with the same rights and immunities and the same participation (and no other) in the national funds as native Cherokees;" and

Whereas under the provisions of the aforesaid fifteenth article an agreement was entered into between the Cherokee Nation and the Shawnee tribe of Indians, on the seventh day of June, eighteen hundred and sixty-nine, and approved by the Secretary of the Interior and the President of the United States, respectively, on the ninth day of June, eighteen hundred and sixty-nine, by the terms of which the Shawnee Indians were incorporated into and became a part of the Cherokee Nation on equal terms in every respect, and with all the privileges and immunities of native citizens of the Cherokee Nation; and

Whereas it is provided by the sixth article of the aforesaid treaty that all laws of the Cherokee Nation shall be uniform throughout said Nation; and

Whereas by an item in the act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-four, and for other purposes, approved March third, eighteen hundred and eighty-three, the sum of three hundred thousand dollars was "appropriated, to be paid into the treasury of the Cherokee Nation, out of the funds due under appraisement for Cherokee lands west of the Arkansas River, which sum shall be expended as the acts of the Cherokee legislature direct;" and

Whereas by an act of the Cherokee legislature, which was passed over the veto of the principal chief and became a law on the nineteenth day of May, eighteen hundred and eighty-three, the principal chief was directed to cause the said sum of three hundred thousand dollars to be paid out per capita to the citizens of the Cherokee Nation by blood and which sum has been paid out only to Cherokee citizens by blood, as directed by said act; and

Whereas by the said act of the Cherokee legislature the aforesaid freedmen, Delaware and Shawnee Indians have been deprived of their legal and just dues guaranteed them by treaty stipulations: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of seventy-five thousand dollars, or so much thereof as may be necessary, to carry out the provisions of this act; and the amount actually expended shall be charged against the Cherokee Nation, on account of its lands west of the Arkansas River, and shall be a lien on said lands, and which shall be deducted from any payment hereafter made on account of said lands. The said sum, or so much thereof as may be necessary, shall be by the Secretary of the Interior distributed per capita, first, among such freedmen and their descendants as are mentioned in the ninth article of the treaty of July nineteenth, eighteen hundred and sixty-six, between the United States and the Cherokee Nation of Indians; second, among the Delaware tribe of Indians incorporated into the Cherokee Nation by the terms of a certain agreement entered into between said Cherokee Nation and Delaware Indians, under the provisions of the fifteenth article of the aforesaid treaty, on the eighth day of April, eighteen hundred and sixty-seven, and approved, respectively, by the President of the United States and the Secretary of the Interior, on the eleventh day of April, eighteen hundred and sixty-seven; and, third, among the Shawnee tribe of Indians incorporated into the Cherokee Nation by the terms of a certain agreement entered into between the said Cherokee Nation and Shawnee Indians, under the provisions of

the aforesaid article and treaty, on the seventh day of June eighteen hundred and sixty-nine, and approved, respectively by the President of the United States and the Secretary of the Interior on the ninth day of June, eighteen hundred and sixty-nine, in such manner and in such amount or amounts as will equalize the per capita payment made to Cherokees by blood in accordance with the act of the Cherokee legislature aforesaid, out of the sum of three hundred thousand dollars appropriated by the act of March third, eighteen hundred and eighty-three, aforesaid.

Approved, October 19, 1888. (25 Stat. 608.)

An Act Admitting to the Right of Citizenship Certain Creek Indians.

Whereas certain Creek Indians, with their families, emigrated from the east of the Mississippi River, in the several detachments of Cherokees that removed in 1838 and arrived in 1839; and whereas the said Creek Indians, having been received by the Cherokees into their Nation east, under their customs and agreement then existing between them and the Creek Nation, and thereby becoming a part of the Cherokee people and subject to the Cherokee laws: therefore, in order to remove all doubts as to their right to live and enjoy the privileges and citizenship in the Cherokee Nation:

Be it enacted by the National Council, That all the Creek Indians who emigrated to this country in the several detachments of Cherokees, as aforesaid, and also all those Creek Indians, together with their families, who were allowed the right of suffrage among the Western Cherokees, previous to the arrival of the Eastern Cherokees in 1839, be, and they are hereby recognized and admitted to the enjoyment of the rights and privileges of citizenship of this Nation.

Tahlequah, November 13, 1843.

Approved.

JOHN ROSS.

Const. and Laws, Cherokee Nation, ed. 1875, p. 250.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *September* 22, 1894.

I, Frank C. Armstrong, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true and literal copy of certified copy of an act of the Cherokee National Council, entitled "An act providing for breadstuffs for the Cherokee people," approved November 19, 1874, *filed in the Indian Office in pursuance* of the provision of the 14th section of the Indian Appropriation Act, approved March 3, 1875 (18 Stats., p. 451), appropriating $200,000 to be distributed among the Cherokee Indians, and requiring certified copy of said act of Council to be so filed, as the same appears on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above witten.

[SEAL.] FRANK C. ARMSTRONG,
Acting Commissioner.

An Act Providing for Breadstuffs for the Cherokee People.

Whereas it appears from numerous petitions, signed by many citizens from various parts of this Nation, that because of the protracted drought that prevailed throughout this country during the past spring and summer, that there is and will be great scarcity of breadstuffs among the people, and that as a consequence thereof there will be much suffering among the people if left alone to their own limited resources until the crops of the next summer shall have matured.

And whereas the people have petitioned for aid in obtaining breadstuffs sufficient to relieve them until their crops of the next summer shall have matured: Therefore,

Be it enacted by the National Council, That the Cherokee Delegation about to proceed to the seat of government of the United States, at Washington, be and they are hereby instructed and directed to negotiate with the proper authorities of the United States, on the most reasonable terms, a loan of five hundred thousand dollars ($500,000)

to be refunded out of the proceeds of the Cherokee lands lying west of the Arkansas River and south of Kansas when realized; and the said funds shall be and they are hereby appropriated to be paid to the whole Cherokee people, "*per capita*," in the manner hereinafter prescribed, to enable them to purchase breadstuffs.

Be it further enacted, That, for the purpose of carrying out the provisions of this act, that the Principal Chief, by and with the advice of the Executive Council, be and he is hereby authorized, at his earliest convenience, in the manner most feasible and economical, to have correct rolls taken of the whole Cherokee people within the limits of the Cherokee Nation, and to turn over the same when completed, certified to by him, to the Treasurer of the Cherokee Nation; and it shall therefore be the duty of the said Treasurer to file the said rolls in his office, and as soon thereafter as he may be advised by any proper authority that the said funds have been realized by the Cherokee authorities, he shall make requisition for the same upon the proper authority of the United States. On receiving said funds it shall be the duty of said Treasurer to pay the same out, "*per capita*," to the whole Cherokee people, according to the said census rolls. In making said payments the Treasurer is hereby directed to pay the funds in person to all adult persons entitled to the same, and to parents, guardians, and heads of families representing minors and disabled persons, and no other person or persons whomsoever. A receipt roll shall be kept by the Treasurer showing the payments made, and to whom, and which shall be reported to the National Council next following said payment.

Be it further enacted, That the Principal Chief be and he is hereby authorized to draw warrants, payable out of any funds belonging to the General Fund and not otherwise appropriated, to pay the expenses of taking the census rolls herein provided for.

Approved, November 19, 1874.

WILL. P. ROSS,
Principal Chief.

An Act Providing for the Payment of the Balance Due on Lands West of 96° per Capita.

Be it enacted by the National Council, That when the additional amount appropriated by Act of Congress of March 3, 1883, shall have been received by the treasurer of the Cherokee Nation the principal chief shall cause the same to be paid out *per capita* to the citizens of the Cherokee Nation by Cherokee blood.

Be it further enacted, That for the purpose of carrying out the provisions of this Act the principal chief shall, at his earliest convenience, appoint two competent persons in each district to make correct census-rolls of the persons entitled, and turn over the same, certified by him, to the treasurer of the Cherokee Nation, who shall file the same in his office.

Be it further enacted, That the persons appointed by the principal chief to take the census shall each be entitled to three dollars per day ($3.00) while in actual service.

Be it further enacted, That as soon as advised by the proper authorities that the funds are ready it shall be the duty of the treasurer to make requisition for the same, and on receiving the same (said funds) it shall be his duty to pay the same out *per capita* to citizens by Cherokee blood according to the census-rolls. * * *

Be it further enacted, That the treasurer shall make the payments at Tahlequah, Vinita, Fort Gibson, and Webber's Falls.

Passed by the constitutional two-thirds of National Council, May 19, 1883.

(Laws and joint resolutions of the Cherokee Nation of the years 1881–'2–'3, pages 139 and 140.)

Construction of the Rights of Cherokee Citizenship as Designed to be Conferred upon Freedmen and Friendly Indians by the, 9th and 15th Articles of the Treaty of 1866.

Whereas section 20th of article 3 of the constitution vests the sole power of construing treaty stipulations in the Na-

tional Council, acting in behalf of the nation as one of the parties to any treaty; and

Whereas, pursuant to this "power" the National Council did, on the 26th day of November, A. D. 1866, relating to free colored persons and freedmen formerly slaves of Cherokee citizens and contained in the 9th article of said treaty, as well as relating to friendly Indians who might be settled east of 96° of west longitude, according to article 15th of said treaty, by declaring such free colored persons, freedmen and friendly Indians citizens of this nation the same as native Cherokee residents and adopted whites, but omitted to define and construe what rights and privileges did attach to such citizenship as then understood and intended to be confirmed and vested and what rights were reserved by the nation making such grant: Therefore,

Be it enacted by the National Council, That the phrase "all the rights of native Cherokees," as used in the 9th and 15th articles of the treaty of July 19, 1866, between the United States and this nation, is hereby construed to mean the individual rights, privileges, and benefits enjoyed by white adopted citizens of this nation before and at the making of said treaty, and who had been by law admitted to "all the rights of a native Cherokee," civil, political, and personal, as subjects of the Cherokee Nation of Indians, without acquiring any right or title to the Cherokee domain or to the proceeds thereof when made subject to a division among those to whom such domain had been conveyed, all the rights to the lands held and owned by this nation, and to the principal of the proceeds thereof when realized being reserved by and to the original Cherokee owners, as in the case of white adopted citizens as aforesaid, subject to be conveyed or granted only at the option of said owners or for value received according to agreements provided to be made with friendly Indians in conformity with the 15th article of said treaty.

Be it further construed and declared, That agreeably to such understanding of the 15th article of said treaty the value of the lands west of the Arkansas River having not been computed when ascertaining the just proportion of money to be paid by the Delawares and Shawnees when

admitted as citizens of this nation, said tribes were, when adopted, and now are entitled to the above-defined civil, political, and personal rights of individual citizens as subjects of this Government, with such rights to the national domain and funds as were by them or either of them paid for, as per agreement made in conformity with the said 15th article, and that any just title to the Cherokee lands west of 96° or to the principal of any of the proceeds thereof was not by them purchased nor by them acquired since.

Approved April 27, 1886.

(Laws and joint resolutions of the Cherokee Nation, 1884–'5–'6, pp. 38, 39, 40, and 41.)

[This document is not found in the record, although it was read to the court below.]

WASHINGTON, D. C., *March* 18, 1890.

To the Committee on Indian Affairs.

The Delawares, resident in the Cherokee Nation, Indian Territory, have a trust fund in the hands of the Government amounting to over eight hundred thousand dollars, the interest of which is paid to them semi-annually.

They have at different times applied for the distribution of this fund. A renewed application is now made through their legally authorized representative, Charles Journeycake. This measure has practically received the unanimous approval of the Delawares, who are *bona fide* citizens of the Cherokee Nation. The 15 Article of the treaty of 1866, between the United States and the Cherokee Nation, provides as follows: "The United States may settle any civilized Indians friendly with the Cherokees and adjacent tribes within the Cherokee country on unoccupied lands east of the 96°, on such terms as may be agreed upon by any such tribe and the Cherokees subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization there being first paid into the Cherokee national fund a sum of money which shall sustain

the same proportion to the then existing national fund, that the number of Indians sustain to the whole number of Cherokees they shall be incorporated into and *forever remain* a part of the Cherokee Nation on equal terms in all respects with native citizens."

On the 8th day of April, 1867, articles of agreement were entered into between legal representatives of the Cherokee Nation and the Delaware tribe of Indians in accordance with the 15th Article of the said treaty above quoted. Under the terms of this agreement the Delaware tribe of Indians agreed to pay the Cherokee Nation "a sum of money, which shall sustain the same proportion to the existing Cherokee national fund that the number of Delawares, registered as above mentioned, and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation."

The said agreement concludes as follows:

"On the fulfilment by the Delawares of the foregoing stipulations all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national fund, as native Cherokees, save as hereinbefore provided." "And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees."

The Delawares on their part have complied with all the conditions of this said agreement. They removed to the Cherokee Nation in the year 1867, where they have since lived, and, as stated, are to "*ever after remain a part of the Cherokee Nation.*"

The status of the Delawares as citizens of the Cherokee Nation is thus clearly defined.

As the legal representatives of the Cherokee Nation, we have been officially authorized and instructed by an Act of our legislature to assist our Delaware brethren in their efforts to obtain a full and complete settlement with the Government, and we cheerfully comply with our instructions, fully convinced that the interests of the Delawares will be subserved by the distribution to them of the said fund.

We offer below some of our reasons in support of these views.

The Delawares are a stock-raising and agricultural people, subsisting mainly as such; they have arrived at a state of civilization where an annuity is no longer necessary for their prosperity, and, in our opinion, are fully competent to dispose of their own money to the best advantage. Favorable opportunities for investment are everywhere present. The rapid improvement of our country makes it plainly apparent that all choice bodies of land will soon be occupied and those of our citizens are fortunate who will have the means to locate and improve these lands before they are all taken up. Stock-raising is there an established and lucrative business, and is a splendid field for investment. Money can then be loaned on unquestioned security at double the interest the Delawares are now receiving from the Government. While the Delawares are scattered over a country seventy-five to eighty miles in length, the stated annuity that they are paid has, in some respects, a tendency to keep them a separate and distinct people, not in the interests of harmony and good feeling. We also believe that stated annuities have a tendency to encourage indolence, and not self-reliance.

An ample school fund secures to our people all alike the blessings and advantages of education. The Cherokee Nation has also a liberal and permanent fund for judicial and executive purposes, and no probable reason exists for the diminution of these funds. During the last Congress a distinguished member of that body opposed the proposed measure which was then being considered, upon the grounds that the Delawares would spend their money and then become dependent upon the United States Treasury, clearly showing a misapprehension upon the subject as they could never become so dependent unless the Cherokee Nation should alike become dependent. Nor can the withdrawal of this fund from the hands of the Government in any way affect the pecuniary interests of the Cherokee Nation, as the money asked for is owned solely by the Delawares, a surplus of their original tribal interests remaining to them after they had purchased equal rights in the Cherokee Nation.

Knowing the Delawares as we do, being personally acquainted with them, we feel fully justified in submitting the foregoing statement.

Very respectfully,

J. B. MAYES,
Principal Chief, Cherokee Nation.

JOHN L. ADAIR,
D. W. BUSHYHEAD,
Cherokee Delegates.

REPORT OF THE COMMITTEE ON FEDERAL RELATIONS TO THE NATIONAL COUNCIL, MADE IN NOVEMBER, 1883.

To the Honorable the National Council:

GENTLEMEN: Your committee, to whom was referred the Chief's message transmitting memorials of the Shawnee and colored citizens of the nation asking for a definition of their status in view of the constitution and treaties as to their rights to their lands and the proceeds thereof, respectively, beg leave to report that, having given the question that deliberation which under the circumstances we consider was due, we have the honor to report: It is true that the "patent" was made to the Cherokees by right of blood, and so continued to be vested until the exigencies of the late war arose, when, in 1866, it became necessary to make a new treaty with the Government. By this treaty other classes of persons were provided to be vested with all the rights of native Cherokees upon specified conditions. These conditions have been fulfilled as regards the acknowledged colored, Delaware, and Shawnee citizens. Article 9 of the treaty of 1866 provides for the manner in which these colored shall obtain rights, while the first clause of Article 15 of same treaty provides as regards Indians to be settled east of the 96th meridian. The language is, they shall have all the rights of native Cherokees and be incorporated into, and ever after remain a part of, the Cherokee Nation, on equal terms in every respect with native Cherokees.

The constitution makes acknowledged treaties the supreme law, and authorizes the National Council to construe

treaty stipulations. Section 5, page 31, Compiled Laws, adds to "native-born Cherokees," who had alone composed the Nation before the ratification of the several parts of the treaty by the people in convention as permanent amendments to our constitution, three other classes of persons, making them all citizens of the Nation alike, colored, whites by adoption, and Indians by adoption. Section 2, article 1, of the constitution, makes the lands of the Nation common property, while section 1 of the amendment to article 1 of the constitution defines what and where the lands are. These lands are those described by the treaty of 1833, which include the lands west of the Arkansas river, subject only to the modifications of the treaty of 1866.

We are therefore of the opinion that if the lands of (the) Nation were and are the common property of citizens, then no citizen whom by the operation of the treaties and constitution are made citizens, can be legally deprived of his or her right and interest without doing an injustice and a violation of the constitution which we are bound to observe and defend. While the lands remain common property all classes of citizens, as defined by the constitution, have an equal right in it, and when any of the lands are sold, under provision of treaty, all citizens have an equal right to the proceeds whether divided per capita or invested.

In consideration, therefore, of the views as in the above and foregoing report, we have the honor to submit the accompanying bill.

C. V. ROGERS,
H. T. LANDRUM,
E. E. STARR,
Committee.

I hereby certify that the foregoing two and a half pages is the original report as made by the Committee on Foreign Relations.

JOHN S. DREW,
Clerk of the Senate.

(Senate Ex. Doc. No. 86, 48 Cong., 1st sess., p. 24.)

Veto Message.

Executive Department,
Cherokee Nation, Indian Territory, Tahlequah,
May 18, 1883.

To the Honorable the Senate in extra session convened:

Gentlemen: I herewith respectfully return the bill entitled "An act providing for the payment of the balance due on the lands west of 96°, *per capita*," which originated in your body, for the following reasons:

To the payment of the money per capita I do not object, but to the part of the bill which confines that payment to a certain class of citizens exclusive of other classes I do object, as calculated to defeat the object of the bill, because contrary to our constitution and our treaties. The part of the bill I refer to is the part confining the payment to Cherokee citizens by right of Cherokee blood.

1st. It may be said that the payment *per capita* in 1881–'82 was made to this class entirely upon the ground that they alone had a right to that money; this is true.

It may also be said that the lands of the Cherokee Nation west, including those now considered, were conveyed to the Cherokee Nation, at that time composed wholly of Cherokees by blood; that also is true. It may also be said that no need of conveyance has since been made to other classes of citizens, and that the colored citizens and adopted whites have paid nothing for their interest in these lands; that also cannot be disputed. Lastly, it may be said that the Shawnee and Delaware citizens of this nation, whatever their rights may be to an interest in our lands east of 96°, have paid nothing for an equal interest with native Cherokees to the lands west of the Arkansas River; that is undeniable.

But, senators, it is just as *true* and *indisputable* that the Cherokees by blood who were once the sole owners of the eastern country and this, were competent and qualified to share their common interest with whoever they might choose. There are two methods of disposing of the national right to this country. One is a sale of lands by national authority

alone. The other is by incorporating outsiders, and investing them with the rights and privileges of the native Cherokees without qualification. In either case the common property interest of other citizens is decreased just in proportion to the amount of land sold or the share parted with. What I now affirm is that the Cherokee Nation of Indians had the right of property-holders to either sell their common property to, or share it with, others, if they saw fit, for large or little consideration, by agreement, contract, or treaty, by their own motion and will.

The question is now whether the native Cherokees have done this as respects the colored and other classes of citizens of this nation. Let me remark that it is neither my right, duty, interest, or desire to reduce in the least interest of any portion of our people, whether old settlers, emigrant Cherokees, or any other class, but any portion of the people having an exclusive interest can, if they so choose, part with or share it with others not before entitled. The whole nation can do the same with the national interest in lands, money, and rights. The question is, has the nation done so? If it has, the responsibility of the act is not mine or yours. But the responsibility will be great and ours alone if, *after* the nation has made a solemn covenant and done a solemn act involving its good faith, the representatives of the nation shall expose it to the charge of repudiation and bad faith. I know that you will agree with me that where so much of our future as a nation depends on the good faith of the United States Government, it is of the utmost importance that the nation sustains its own good character for square dealing.

2d. I refer you to the second clause of the constitution of 1839, page 13, Compiled Laws, to show who were *then* alone entitled to citizenship and ownership of the nation. They were specified as the children of men and women of Cherokee blood, in other words "*native Cherokees.*" The National Council could not take away or reduce any of their rights and privileges as exclusive citizens, but they themselves could do so by treaty or by amendment to the constitution.

3d. The "patent" was made to the "Cherokee Nation"

in 1838, and the Cherokee Nation was then composed of citizens by right of blood, and so continued to be until the exigencies of the late war arose, when, in 1866, it became necessary to make a new treaty with the United States Government. By this treaty, made by and with this nation, other classes of persons were provided to be vested with all the rights of "*native Cherokees*" upon specified conditions. These conditions have been fulfilled as regards the acknowledged colored citizens of this nation and the so-called Delaware and Shawnee citizens. I refer you to article 9th of said treaty in regard to colored citizens, and article 15th, first clause, as regards Indians provided to be settled *east* of 96°. The language is, they shall have all the rights of native Cherokees "and" they shall be *incorporated into* and ever after remain a part of the Cherokee Nation on equal terms *in every respect with native Cherokees.*

4th. I now refer you to that part of the constitution which makes acknowledged treaties, the supreme law, and authorizes the National Council solely to construe treaty stipulations. On page 83, Compiled Laws, you will find the names of the president of the then national committee, the speaker of council and principal chief, signed to the construction of the treaty of 1866, by the National Council, and the construction of the several parts of said treaty was formally ratified by a convention of the people as permanent amendments to our constitution. Of these amendments, section 5, page 31, Compiled Laws, adds to "*native-born Cherokees*" who had alone composed the nation before that time three other classes of persons, making them all citizens of the nation alike, colored, liberated persons of specified classes, whites, by adoption, and Indians, by adoption. Of these the colored class and Indians settled east of 96° have *all* the rights of native Cherokees by operation of the nation's treaty. Other Indians by adoption and whites legally adopted are joined with the others named and made citizens by the constitution.

What then are the rights of Cherokee citizenship? I refer you to section 2, article 1, of the constitution. The lands of the nation are the common property of the nation. Who composed the nation? What other answer is possible to

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

THE CHEROKEE NATION AND THE UNITED STATES,
Appellants,
vs.
CHARLES JOGHNEYCAKE,
Principal Chief of the Delaware Indians,
Appellee.
No. 659.

THE CHEROKEE NATION AND THE UNITED STATES,
Appellants,
vs.
JOHNSON BLACKFEATHER,
Principal Chief of the Shawnee Indians,
Appellee.
No. 671.

REPLY BRIEF FOR THE CHEROKEE NATION, APPELLANT.

CHARLES A. MAXWELL,
GEORGE S. CHASE,
Counsel for Appellants.

PRESS OF B. A. T. MASSEY, OF D. C.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

THE CHEROKEE NATION AND THE UNITED STATES, *Appellants*,

vs.

CHARLES JOURNEYCAKE, *Principal Chief of the Delaware Indians, Appellee.*

No. 619.

THE CHEROKEE NATION AND THE UNITED STATES, *Appellants*,

vs.

JOHNSON BLACKFEATHER, *Principal Chief of the Shawnee Indians, Appellee.*

No. 671.

REPLY BRIEF FOR THE CHEROKEE NATION, APPELLANT.

We attach hereto an outline map of Kansas and the Indian Territory, showing the location, acreage and proper relative dimensions of the four bodies of land owned by the Cherokee Nation at the time the agree-

ment in question was entered into—April 8th, 1867. These figures vary a little from those set out in our main brief, being made to correspond exactly with the record, to wit:

	Acres.
"Strip" lands in Kansas, ...	435,000
"Neutral" lands in Kansas, ...	800,000
Lands east of 96°, Indian Territory, . . .	5,000,000
Lands west of 96°, Indian Territory, . . .	8,000,000
Total, ...	14,235,000

We have but a suggestion or two to make in reply to the briefs and arguments of the appellees. So far as the Blackfeather case is concerned, we have nothing to say further than to call the attention of the Court to the fact that there is not a word between the lids of this brief in support of the decree of the court below. On the other hand, it is an attack upon the decree for alleged errors in finding the number of Shawnees entitled to recover, the amounts due, *per capita*, and the gross amount of the decree, although no appeal from any of these findings or from the decree was taken by the appellee. We submit that as to 671 we are entitled to have the decree of the court below reversed.

As to 619, the Delaware case, counsel for appellee assert that our estimate of the *per capita* wealth of the Cherokees is too great, being based partly on the value of their lands, estimated at $1.25 per acre, except the "Neutral" lands, which are fixed at $1.00 per acre. They then refer to the fact that the Creek and Seminole lands ceded at about the same time, were estimated at 15 and 30 cents per acre, and they conclude:

"Considering all these facts, we are well warranted in concluding that the Cherokee lands both east and west of 96°, did not exceed in value in 1867, the value

placed upon the Seminole lands in 1866, to wit: 15 cents per acre. The total fortune of the Cherokee people, in 1867, computed on this basis, can be clearly stated as follows."

They then figure all the lands of the Cherokees at 15 cents per acre, and make out a *per capita* wealth of only $283.69.

Such contention as this is the merest folly. By this very agreement the "Neutral" lands were estimated at $1.25 per acre, by consent of both parties. The "Strip" lands, that counsel figure at 15 cents per acre, were *actually sold*, under the provisions of this same treaty of '66, and *brought* $1.25 cents per acre. (Record pp. 24 and 29) 435,000 acres brought $543,717.54. It is more than a weste of time to figure that a thing *ought not* to be more than a guess price, when it has actually sold in the open market for more than eight times that amount.

There is an error in our principal brief in stating the Neutral lands at 1,000,000 acres. There were but 800,000. (Record p. 34, top page 24.) These lands were estimated in the agreement itself at $1,000,000, or exactly $1.25 per acre, which is the figure we have taken.

It is a matter of too recent history for counsel to have forgotten, that Congress (acts of March 1st and 2d, 1889) being convinced that the consideration paid to the Creeks and Seminoles was grossly inadequate, and that the Indians were overreached and did not understand that they were *ceding* their lands away, appropriated *over four million dollars* to pay these same Creeks and Seminoles the difference between that 15 and 30 cents per acre, and $1.25 per acre, which by that act Congress asserts, at a tremendous cost to itself, is the price these lands were worth in 1867, and which these Indians should have been paid. Again counsel seem to for the moment

to forget that the Delawares by this same agreement *paid* $1.00 per acre for 157,600 acres which they now want to "estimate" at 15 cents per acre!

As to the "appraisement" of these lands which counsel characterizes as "a deliberate estimate," we only desire to remark that that "appraisement" was declared by the federal courts to have been wholly without authority, and of no force whatever (27 Fed. Rep., pp. 614-615) and consequently in no sense committal upon the Cherokees. So much for this far brought effort to belittle the Cherokees' vast landed wealth in 1867. The figures put by us upon the lands are the prices fixed by the parties themselves, at the time, and at which the lands actually sold.

The fact is, the Delawares purchased certain lands of the Cherokees, equal to something less than one-ninetieth of their landed possessions, and contributed to the interest-bearing fund, in lieu of taxes, enough to meet their part of current expenses, as they then existed. The rate of expense has increased, and the Cherokees have met it, while the Delawares and Shawnees have failed to contribute. Now the latter want to claim an interest in the whole possessions and wealth of Cherokees eighty-nine-ninetieths of which they never attempted to pay for, not to mention the national fund proper, which the Cherokees have increased from $1,799,000.00 to $2,636,634.00.

But counsel say another reason in justification of a low estimate on the Cherokee holdings west of 96° is the weakness of their title, etc., etc.

Now the strength of the Cherokee title to the lands west of 96° has been passed upon by the courts many times, and always with the same result, the much-talked-of Calhoun letter to the contrary, notwithstanding.

Judge Parker, in the case of the United States *vs.* Reese, said:

"The Cherokee tribe of Indians hold their lands by a title different from the Indian title—by occupancy. They derive it by grant from the United States. It is a base, qualified or determinable fee, without the right of reversion, but only a possibility of reversion in the United States. All the estate is in the Cherokee Nation of Indians." (5 Dillon, 405.)

See also, Holden *vs.* Joy, 17 Wall., 250; United States *vs.* Rogers, 23 Fed. Rep., 659; United States *vs.* Soull *et al.*, 30 Fed. Rep., 918; Cherokee Nation *vs.* S. Kan. Ry., 135 U. S., 641.

In the latter case, which is a recent utterance of this court, wherein the lands west of 96° are under discussion, the court say: "The fact that the Cherokee Nation holds *these lands in fee simple, under patents from the United States*, is of no consequence in the present discussion; for," etc.

In the Rogers case, above cited, the court holds that the title of the Cherokees to the outlet lands is the same as to the "home reservation."

That in 1888, Congress "expressed its opinion as to the rights of the Delawares," will, we apprehend, not go far in the consideration of the question raised in this record. The treaty making power of the government is created by the constitution, and neither treaties properly concluded nor contracts of individuals are subject to construction by Congress. This is the function of the courts. That the Delawares and Shawnees succeeded in 1888, in getting through Congress an appropriation and having it charged to the Cherokees, will hardly be treated as a construction of this agreement, especially when Congress on being importuned a second time in the same behalf, referred the question to the courts, which is the occasion of the suits at bar.

In reply to our suggestion that it could not have been the intention of the government to visit upon the Chero-

kess greater punishment for having permitted the institution of slavery than upon the people of the southern states, who were responsible in a larger degree, counsel for appellee exclaim, "But the government was, beyond all possibility of mistake, guilty, at that very time (1866) of just such an outrage on the Creeks," and quote from the Creek treaty the provision, that their freedmen should have and enjoy "all the rights and privileges of native citizens, *including an interest in the soil and national funds.*"

This provision is unquestionably inserted in the Creek treaty (14 Stat., 786, Art. II) but it is difficult to comprehend how the expression of this provision in the Creek treaty lands any force to the proposition that the same thing was intended in the other treaties concluded at about the same time in which it is conspicuously absent.

There are other facts, *de hors* the record, to be sure, but of general notoriety and information, which sufficiently explain why this distinction was made. It is well known that in the Creek Nation intermarriage with the blacks has gone on to such a degree that there was and is little, if any, pure Indian blood in that Nation. The line where one leaves off and the other begins has long been lost, and it would have been impossible to have solved the question, with any degree of justice as to who were Creeks by blood and who not. In the Cherokee Nation, on the other hand, there was practically no amalgamation, which is the condition, even to the present time, and consequently the reason which made the language of the Creek treaty an imperative necessity had no operation whatever in the transaction with the Cherokees.

Counsel enter at great length, both in the brief and argument, into the discussion of a certain veto message

by D. W. Bushyhead. We find nothing of this in the record, and think it highly improper to attempt to inject it into the case at this time and in this manner. There were political reasons which prompted that message, which it would be highly improper for *us* to go into here. Suffice it to say that the act was passed over the veto, and that Mr. Bushyhead was afterwards of a wholly different opinion, and was chairman of the Cherokee delegation sent here to oppose the further recognition of the claims of the Delawares and Shawnees to an interest in the Cherokee lands, and assisted in preparing, and signed the memorial opposing such action, which resulted in the reference of the question to the courts. This whole subject, however, is entirely *de hors* the record, and should have no significance whatever.

That these lands were *not* held, or intended to be held by a communal estate, as between Cherokees and the adopted citizens, is apparent from the fact that the Delawares provided that 160 acres to each man, woman and child of their tribe should be *guaranteed*, no matter what amount might fall to individual Cherokees in case of a final division in severalty.

CHARLES A. MAXWELL,
GEORGE S. CHASE,
Attorneys for Appellant,
the Cherokee Nation.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

v.

CHARLES JOURNEYCAKE, PRINCIPAL CHIEF OF THE DELAWARE INDIANS, APPELLEE.

No. 619.

Motion to Rectify the Decree or Direct the Lower Court to Do So.

Now comes the appellee and moves the court to rectify the decree in this cause hereinbefore rendered by the Court of Claims, by striking out the last three lines of clause three, after the word "Nation," and inserting in lieu thereof the following:

"A sum equal to the amount each individual Cherokee received from said funds, so unlawfully paid, multiplied by the number of Delawares who were then entitled to receive an equal distributive share with the Cherokees by blood" (Record, 45).

Amend clause five so as to make it read as follows:

November 25, 1890, existed; and if there is to be paid from the *present* Cherokee funds a sum of money "equal to the aggregate amount which the Delawares would have received if the before-mentioned unconstitutional restrictions in said statutes had not existed," then there must be paid them, in equity, under this decree, the sum of $22,504.35, instead of $17,011.

The Cherokees *by blood* received *per capita*, under the first distribution to them of $300,000 of the lease money, $15.95, and under the second distribution $13.70, making for each in the distribution of the $600,000 the sum of $29.65. (Finding IV, Shawnee Case, No. 671.)

The court holds that the Delawares were equal owners in that money. But the specific fund cannot be recovered. It has been distributed to individuals and is out of reach. Therefore, to do justice to the Delawares the court orders certain payments be made them. But these payments, again, are to be made from funds owned by the Delawares as well as by Cherokees by blood.

In attempting to carry out the equitable principle laid down in the decree, the court states a mathematical method that simply brings the wrong result. It takes $600,000 and divides it by 26,771, being the whole number of Cherokee citizens of all classes, and multiplies the quotient by 759, the number of Delawares. This gives a result of $17,011, which the court directs to be distributed among the Delawares *per capita*. That would give to each of the 759 Delawares the sum of $22.41—a loss to the individual of $7.41 and to the tribe of $5,495.16.

The mathematics of the court below would be correct if the money to be paid to the Delawares should be taken from the individual Cherokees who were paid the $29.65 each.

It seems to us that the problem is a simple one. The

Cherokees *by blood* received from the common fund $29.65 each. The Delawares are entitled to be paid from the common fund, under the principle of the decree, $29.65 each. Thus the problem is 759 × $29.65 = $22,504.35.

CAN THIS COURT RECTIFY THE DECREE, ON MOTION?

In appeals in chancery cases the whole record is before the appellate court. It may, generally, order or decree whatever may be necessary that equity may be done.

The appellee in this case asks a rectification of the decree to correct an error apparent on its face. This could have been done by the court below on motion, after the decree was enrolled.

"The court will, in some cases, extend the indulgence of "rectifying decrees in which there have been clerical "mistakes, to decrees which have been actually enrolled. "Thus, in cases of miscasting, where the matter demon-"stratively appears upon the decree itself to have been "mistaken, it may be explained and rectified by order," &c.

Daniell's Ch. Pl. & Pr., 6 ed. 1030, 1031, with authorities in note 11.

Whatever the court below might have done after the decree was enrolled, the appellate court may do.

McLane *v.* Paschall, 62 Texas, 102.

Gutbrecht *v.* Pros. Park & C. I. R. Co., 28 Hun. 497.

Kelmer *v.* N. Y. C. & H. R.R. Co., 94 N. Y. 495, as cited by Am. and Eng. Encyclopedia of Law, vol. 1, 627.

The rule that clerical errors in the decree may be corrected by the original court after enrollment, and by the appellate court, is found in all the books.